

37 Am. Jur. 2d Fraud and Deceit § 99

American Jurisprudence, Second Edition | May 2021 Update

Fraud and Deceit

George Blum, J.D., John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Karl Oakes, J.D. and Eric C. Surette, J.D.

IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

2. Promises and Statements of Intention

b. Promises Made with Intention Not to Perform

§ 99. Effect of the statute of frauds; parol evidence rule

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West's Key Number Digest

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There is a conflict of authority on the question of maintaining an action for fraud or deceit predicated upon an oral promise within the statute of frauds. While many cases bear indirectly or argumentatively on the question,¹ a number of cases state or indicate that the mere refusal to perform such oral promise is not of itself a fraud for which an action will lie² since in such a case the promisor has not, in a legal sense, made a contract and hence has the right, both in law and in equity, to refuse to perform.³ It has been stated that an action brought upon such a promise would be considered one brought on an unenforceable contract, rather than a maintainable one in tort for deceit where the damages claimed showed that in its essence the action was attempted to be premised upon breach of the promise falling within the statute.⁴ Also, it may be otherwise stated that where an alleged oral agreement is unenforceable under the statute of frauds, a party can not recover from the other party for fraud on the theory that the oral promise was made without the intention of performing it.⁵

There is, however, authority for the relaxation of the above principles, especially in cases of great hardship,⁶ and some courts, assuming that fraud may be predicated on an oral promise made with the intention at the time not to perform, have held that the fact that the oral promise is unenforceable under the statute of frauds does not preclude the showing of the promise in an action for deceit.⁷ It has been held that the promisor is estopped from asserting the statute of frauds.⁸ Other courts, while recognizing that the mere nonperformance of an oral promise that falls within the statute of frauds is not such a fraud as would warrant the intervention of a court of equity, nevertheless hold that, if one party is induced by another, on the faith of the oral promise, to place himself or herself in a worse position than he or she would have been in had no promise been made, and if

the party making the promise derives a benefit as a result of the promise, "constructive fraud" exists that is subject to a trial court's equity jurisdiction.⁹

Observation:

Promissory fraud is a promise made without any intention of performing it. The fraud exception to the parol evidence rule does not permit parol evidence of such promissory fraud if the evidence in question is offered to show a promise that contradicts an integrated written agreement. Rather, the evidence must tend to establish some independent fact or representation, some fraud in the procurement of the instrument, or some breach of confidence concerning its use and not a promise directly at variance with the promise of the writing.¹⁰

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Footnotes

- 1 Davidson v. Edwards, 168 Ark. 306, 270 S.W. 94 (1925); Little v. Union Oil Co. of Cal., 73 Cal. App. 612, 238 P. 1066 (1st Dist. 1925); Nanos v. Harrison, 97 Conn. 529, 117 A. 803 (1922); Hazleton v. Lewis, 267 Mass. 533, 166 N.E. 876 (1929); Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936).
Under Louisiana law, unfulfilled, future promises, without more, do not constitute fraud, especially where the oral statements contradict the terms of a writing. *Red Roof Inns, Inc. v. Murat Holdings, L.L.C.*, 223 S.W.3d 676 (Tex. App. Dallas 2007).
- 2 Cerny v. Paxton & Gallagher Co., 78 Neb. 134, 110 N.W. 882 (1907) (dictum); Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929).
- 3 Zager v. Brown, 242 Ga. App. 427, 530 S.E.2d 50 (2000); Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929).
- 4 Papanikolas v. Sampson, 73 Utah 404, 274 P. 856 (1929) (conceding that an action in tort for deceit is unaffected by provisions of the statute of frauds, but stating that to save the action from the statute, it must be shown from the pleadings in their essence that the action is truly one in tort).
- 5 Caplan v. Roberts, 506 F.2d 1039 (9th Cir. 1974) (applying California law).
- 6 Daniel v. Daniel, 190 Ky. 210, 226 S.W. 1070 (1921); Kinkaid v. Rossa, 31 S.D. 559, 141 N.W. 969 (1913).
- 7 Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936).
- 8 Stokes v. Bryan, 42 Ala. App. 120, 154 So. 2d 754, 5 A.L.R.3d 164 (1963).
- 9 Farrington v. Allsop, 670 N.E.2d 106 (Ind. Ct. App. 1996).
- 10 Alling v. Universal Manufacturing Corp., 5 Cal. App. 4th 1412, 7 Cal. Rptr. 2d 718 (1st Dist. 1992).

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37 Am. Jur. 2d Fraud and Deceit § 100

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IV. False Representations

C. Matters of Futurity; Promises and Statements of Intention

2. Promises and Statements of Intention

b. Promises Made with Intention Not to Perform

§ 100. Qualifications of, and exceptions to, prevailing rule

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West's Key Number Digest

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Under certain factual circumstances, the rule that promises made with no intent to perform are fraudulent is not applied. For example, the promises are not fraudulent as far as a complainant is concerned where they are made not to him or her, but to a third person; hence, to be actionable, they must be made to a complainant, or in such a way as to show that the promisor intended them to be responsible for the complainant's ensuing action.¹ Also, if a written contract, to the promisee's knowledge, reveals the falsity of promises made, the promisee cannot invoke the rule that fraud may be predicated on deceitful promises.²

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Footnotes

¹ [Church v. Swetland](#), 243 F. 289 (C.C.A. 2d Cir. 1917).

² [Nelson v. Berkner](#), 139 Minn. 301, 166 N.W. 347 (1918).

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37 Am. Jur. 2d Fraud and Deceit § 101

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IV. False Representations

D. Matters of Law

1. In General

§ 101. Generally

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West's Key Number Digest

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[Misrepresentation by one other than insurance agent as to coverage, exclusion, or legal effect of insurance policy, as actionable, 29 A.L.R.2d 213](#)

[Avoidance of release of claim for personal injuries on ground of misrepresentation as to matters of law by tortfeasor or his representative insurer, 21 A.L.R.2d 272](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 218](#) (Instruction to jury—Reliance on representations of law not justified)

Representations or statements concerning domestic law are not ordinarily regarded as representations of fact but rather expressions of opinion on which no action in fraud will lie even though they are false.¹ It is accordingly well settled, as a general rule, that fraud cannot be predicated upon misrepresentations of law or misrepresentations as to matters of law.² In other words,

claims of fraud generally cannot arise from legal opinions;³ a representation of law is a statement of opinion as to what the law permits or prohibits and cannot support an action for fraud.⁴ The rule embraces opinions on questions of law based on facts known to both parties alike⁵ and extends to representations as to what the law requires to be done⁶ and representations as to what the law will not permit to be done,⁷ especially when the representations are made by the avowed agent of the adverse interest,⁸ or when there is no confidential relationship between the parties.⁹ There are, however, exceptions to the general rule.¹⁰

The American Law Institute takes the position that if an assertion is one as to a matter of law, the same rules that apply in the case of other assertions determine whether the recipient is justified in relying on it.¹¹

One who does not withhold or misstate the facts cannot be adjudged guilty of fraud simply because the courts finally decide the law to be other than it was claimed it to be while litigation continued over the subject in question;¹² thus, a subsequent legal decision adverse to a statement or representation previously expressed as to the law cannot establish prior fraud.¹³ In addition, generally speaking, a charge of fraud cannot be based on an honest mistake in a statement of general law.¹⁴

Observation:

The reasons generally advanced as the basis of the rule that fraud cannot be predicated upon misrepresentations as to matters of law are that everyone is presumed to know the law, both civil and criminal,¹⁵ and is bound to take notice of it¹⁶ and therefore cannot, in legal contemplation, be deceived by such misrepresentations.¹⁷ The rule is sometimes based on the theory that fraud cannot be predicated upon an expression of opinion.¹⁸ Hence, one has no right to rely on such representations or opinions and will not be permitted to assert being misled by them.¹⁹ In spite of this general rationale, however, there is authority that a false opinion of the law, if represented as a sincere opinion, may, as any other opinion, give rise to a fraud claim if it is reasonably relied upon by the other party.²⁰

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Footnotes

- 1 [Bernhan Chemical & Metal Corporation v. Ship-A-Hoy](#), 200 A.D. 399, 193 N.Y.S. 372 (1st Dep't 1922), aff'd in part, rev'd in part on other grounds, 234 N.Y. 563, 138 N.E. 447 (1922).
- 2 [Mutual Life Ins. Co. of New York v. Phinney](#), 178 U.S. 327, 20 S. Ct. 906, 44 L. Ed. 1088 (1900).
- 3 [BP America Production Co. v. Marshall](#), 288 S.W.3d 430 (Tex. App. San Antonio 2008), review granted, (Oct. 1, 2010) and judgment rev'd on other grounds, 342 S.W.3d 59 (Tex. 2011).
- 4 [Brodeur v. American Home Assur. Co.](#), 169 P.3d 139 (Colo. 2007).
- 5 [Mutual Life Ins. Co. of New York v. Phinney](#), 178 U.S. 327, 20 S. Ct. 906, 44 L. Ed. 1088 (1900); [Rice v. Ragsdale](#), 104 Ark. App. 364, 292 S.W.3d 856 (2009).
- 6 [McDonald v. Goodman](#), 239 S.W.2d 97 (Ky. 1951); [Cummins v. Robinson Twp.](#), 283 Mich. App. 677, 770 N.W.2d 421 (2009).
- 7 [Pambianchi v. Howell](#), 100 Ark. App. 154, 265 S.W.3d 788 (2007); [State v. Edwards](#), 178 Minn. 446, 227 N.W. 495, 65 A.L.R. 1253 (1929); [In re Plain State Bank](#), 217 Wis. 257, 258 N.W. 783 (1935).

- 8 Pambianchi v. Howell, 100 Ark. App. 154, 265 S.W.3d 788 (2007); Powers v. Kansas City Public Service Co., 334 Mo. 432, 66 S.W.2d 840 (1933); Traders & General Ins. Co. v. Keith, 107 S.W.2d 710 (Tex. Civ. App. Amarillo 1937), writ dismissed.
Opinions regarding the status or interpretation of the law generally will not provide a basis for an action for fraud or misrepresentation particularly where the statements are made by a nonlawyer who is also an adverse party in a pending action. DePalantino v. DePalantino, 139 N.H. 522, 658 A.2d 1207 (1995).
- 9 Dixon v. Dixon, 211 Ga. 557, 87 S.E.2d 369 (1955); Lynch v. Dial Finance Co. of Ohio No. 1, Inc., 101 Ohio App. 3d 742, 656 N.E.2d 714 (8th Dist. Cuyahoga County 1995).
- 10 §§ 103 to 105.
- 11 Restatement Second, Contracts § 170.
- 12 Alexander v. Randall, 257 Iowa 422, 133 N.W.2d 124 (1965); Cucchiaro v. Cucchiaro, 165 Misc. 2d 134, 627 N.Y.S.2d 224 (Sup 1995).
- 13 Alexander v. Randall, 257 Iowa 422, 133 N.W.2d 124 (1965).
- 14 Glass v. Southern Wrecker Sales, 990 F. Supp. 1344 (M.D. Ala. 1998), *aff'd*, 163 F.3d 1361 (11th Cir. 1998) (applying Alabama law); Alexander v. Randall, 257 Iowa 422, 133 N.W.2d 124 (1965).
- 15 Pambianchi v. Howell, 100 Ark. App. 154, 265 S.W.3d 788 (2007); Meyer v. Santema, 1997 SD 21, 559 N.W.2d 251 (S.D. 1997); Safety Casualty Co. v. McGee, 133 Tex. 233, 127 S.W.2d 176, 121 A.L.R. 1263 (Comm'n App. 1939).
- 16 Pambianchi v. Howell, 100 Ark. App. 154, 265 S.W.3d 788 (2007); McDonald v. Goodman, 239 S.W.2d 97 (Ky. 1951); Krushew v. Meitz, 276 Mich. 553, 268 N.W. 736 (1936).
- 17 Dixon v. Dixon, 211 Ga. 557, 87 S.E.2d 369 (1955).
- 18 Agnew v. Landers, 59 N.M. 54, 278 P.2d 970 (1954).
- 19 Pambianchi v. Howell, 100 Ark. App. 154, 265 S.W.3d 788 (2007); McDonald v. Goodman, 239 S.W.2d 97 (Ky. 1951); Safety Casualty Co. v. McGee, 133 Tex. 233, 127 S.W.2d 176, 121 A.L.R. 1263 (Comm'n App. 1939).
- 20 AIU Ins. Co. v. Deajess Medical Imaging, P.C., 24 Misc. 3d 161, 882 N.Y.S.2d 812 (Sup 2009).

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37 Am. Jur. 2d Fraud and Deceit § 102

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IV. False Representations

D. Matters of Law

1. In General

§ 102. Application of rule of nonliability

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West's Key Number Digest

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[Misrepresentation by one other than insurance agent as to coverage, exclusion, or legal effect of insurance policy, as actionable, 29 A.L.R.2d 213](#)

The rule that fraud cannot be based upon misrepresentations as to matters of law or expressions of opinion as to what is the law governing a particular transaction has been applied in many different situations. Pursuant to this principle it has been held that, as a rule, fraud cannot be predicated on misrepresentations as to the legal effect of a written instrument¹ as, for example, a deed,² a note and mortgage,³ a federal land warrant,⁴ or a contract of insurance.⁵

The principle of nonresponsibility for misrepresentations of law has been applied to a statement by a doctor to a widow that it was legally compulsory for her to have an autopsy performed on the body of her husband;⁶ to representations as to matters of law related to the presence of mold in a home;⁷ to an opinion as to when an option given to a third person for the purchase of land will expire;⁸ to representations as to the responsibility of a father and mother for the debts of their son;⁹ and to expressions of opinion by the vendor or vendee of realty as to the liens that certain property is subject to, or as to its freedom from liens,¹⁰ or a false representation by a vendor of land as to a matter of law relating to rights in and to the land.¹¹

In the absence of circumstances evoking exceptions to the general rule,¹² it appears that misrepresentations as to tax law are within the rule that fraud cannot be predicated upon misrepresentations as to law.¹³

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Footnotes

- 1 [Mutual Life Ins. Co. of New York v. Phinney](#), 178 U.S. 327, 20 S. Ct. 906, 44 L. Ed. 1088 (1900).
- 2 [Adkins v. Hoskins](#), 176 Ark. 565, 3 S.W.2d 322 (1928).
- 3 [Wochnick v. True](#), 224 Or. 470, 356 P.2d 515 (1960) (representation that chattel mortgage was valid).
- 4 [Adkins v. Hoskins](#), 176 Ark. 565, 3 S.W.2d 322 (1928).
- 5 [Adkins v. Hoskins](#), 176 Ark. 565, 3 S.W.2d 322 (1928).
- 6 [McDonald v. Goodman](#), 239 S.W.2d 97 (Ky. 1951).
- 7 [Allstate Ins. Co. v. Sutton](#), 290 Ga. App. 154, 658 S.E.2d 909 (2008).
- 8 [Rheingans v. Smith](#), 161 Cal. 362, 119 P. 494 (1911).
- 9 [Yappel v. Mozina](#), 33 Ohio App. 371, 169 N.E. 315 (8th Dist. Cuyahoga County 1929).
- 10 [Bonded Adjustment Co. v. Anderson](#), 186 Wash. 226, 57 P.2d 1046, 106 A.L.R. 166 (1936).
- 11 [Rheingans v. Smith](#), 161 Cal. 362, 119 P. 494 (1911); [Epp v. Hinton](#), 91 Kan. 513, 138 P. 576 (1914), opinion modified on other grounds on denial of reh'g, [Epp v. Hinton](#), 91 Kan. 919, 139 P. 379 (1914).
- 12 §§ 103 to 105.
- 13 [Salter v. Brown](#), 56 Ga. App. 792, 193 S.E. 903 (1937); [Blaisdell v. Derees](#), 101 N.J. Eq. 723, 139 A. 178 (Ct. Err. & App. 1927); [Parker v. Raleigh Sav. Bank](#), 152 N.C. 253, 67 S.E. 492 (1910).

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IV. False Representations

D. Matters of Law

2. Exceptions to Rule of Nonliability

§ 103. Inequitable conduct by representor; special relationship between parties

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West's Key Number Digest

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

[Avoidance of release of claim for personal injuries on ground of misrepresentation as to matters of law by tortfeasor or his representative insurer, 21 A.L.R.2d 272](#)

A representation of domestic law may constitute fraud where it is accompanied by some inequitable conduct on the part of the person making it which induces the other party to rely and act thereon.¹ Much depends upon whether the parties deal on equal terms.² Thus, relief may be granted because of such a misrepresentation where there is a relation of trust and confidence between the parties³ or where the speaker has, or professes to have, superior knowledge of the law.⁴ Hence, the misrepresentation is actionable where one who personally knows the law deceives another by misrepresenting the law⁵ or, knowing such other to be ignorant of it, takes advantage through such ignorance;⁶ or where the person to whom the representations are made relies upon the supposed superior knowledge and experience of the other party and on the statement that it is unnecessary or inadvisable to consult a lawyer;⁷ or where the representor is a long-time resident of the state and is presumed to know its laws and knows that the representee is new in the state.⁸ As one court has summarized it, the "relationship exception" to the general rule that statements of a legal opinion are not actionable in fraud applies if: (1) the parties are in a fiduciary relationship; (2) the party making the statement is a lawyer and the circumstances require him or her to divulge all the information which he or she

possessed to the plaintiff; or (3) the party making the statement is a lawyer and knew that the plaintiff was relying upon him or her as one learned in the law.⁹ As formulated by another court, the rule is that statements which might ordinarily be classified as nonactionable legal opinions are actionable as a fraud claim where: (1) a party with superior knowledge takes advantage of another's ignorance of the law to deceive him or her by studied concealment or misrepresentation, (2) there is a fiduciary relationship between the parties, and (3) misrepresentations involving a point of law are intended to be misrepresentations of fact and are understood as such.¹⁰ It has also been said that a false opinion of the law, if represented as a sincere opinion, may, as any other opinion, give rise to a fraud claim if it is reasonably relied upon by the other party.¹¹

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Footnotes

- 1 [Cucchiario v. Cucchiario](#), 165 Misc. 2d 134, 627 N.Y.S.2d 224 (Sup 1995); [Safety Casualty Co. v. McGee](#), 133 Tex. 233, 127 S.W.2d 176, 121 A.L.R. 1263 (Comm'n App. 1939); [Rice v. Press](#), 117 Vt. 442, 94 A.2d 397 (1953).
- 2 [State v. Edwards](#), 178 Minn. 446, 227 N.W. 495, 65 A.L.R. 1253 (1929); [Hartley Realty Co. v. Casady](#), 332 S.W.2d 291 (Mo. Ct. App. 1960); [Rice v. Press](#), 117 Vt. 442, 94 A.2d 397 (1953).
- 3 [Bowman v. City of Indianapolis](#), 133 F.3d 513 (7th Cir. 1998) (applying Indiana Law); [Loringer v. Kaplan](#), 179 Neb. 215, 137 N.W.2d 716 (1965); [In re Levy's Estate](#), 19 A.D.2d 413, 244 N.Y.S.2d 22 (1st Dep't 1963).
- 4 [Bowman v. City of Indianapolis](#), 133 F.3d 513 (7th Cir. 1998) (applying Indiana law); [Sawyer v. Pierce](#), 580 S.W.2d 117 (Tex. Civ. App. Corpus Christi 1979), writ refused n.r.e., (July 18, 1979); [Rice v. Press](#), 117 Vt. 442, 94 A.2d 397 (1953).
A misrepresentation of the law may be actionable as fraud where it is made by an attorney who thereby induces reliance. [Bowman v. City of Indianapolis](#), 133 F.3d 513 (7th Cir. 1998) (applying Indiana law).
- 5 [Moody v. Stem](#), 214 S.C. 45, 51 S.E.2d 163 (1948); [Safety Casualty Co. v. McGee](#), 133 Tex. 233, 127 S.W.2d 176, 121 A.L.R. 1263 (Comm'n App. 1939); [Madison Trust Co. v. Helleckson](#), 216 Wis. 443, 257 N.W. 691, 96 A.L.R. 992 (1934).
- 6 [Penn Mut. Life Ins. Co. v. Nunnery](#), 176 Miss. 197, 167 So. 416 (1936); [Hartley Realty Co. v. Casady](#), 332 S.W.2d 291 (Mo. Ct. App. 1960); [Moody v. Stem](#), 214 S.C. 45, 51 S.E.2d 163 (1948).
- 7 [Fawcett v. Sun Life Assur. Co. of Canada](#), 135 F.2d 544, 153 A.L.R. 533 (C.C.A. 10th Cir. 1943); [Emerson-Brantingham Implement Co. v. Anderson](#), 58 Mont. 617, 194 P. 160 (1920); [Safety Casualty Co. v. McGee](#), 133 Tex. 233, 127 S.W.2d 176, 121 A.L.R. 1263 (Comm'n App. 1939).
- 8 [Graves v. Cupic](#), 75 Idaho 451, 272 P.2d 1020 (1954) (overruled on other grounds by, [Benz v. D.L. Evans Bank](#), 152 Idaho 215, 268 P.3d 1167 (2012)) (license requirements of business being sold).
- 9 [Brodeur v. American Home Assur. Co.](#), 169 P.3d 139 (Colo. 2007).
- 10 [BP America Production Co. v. Marshall](#), 288 S.W.3d 430 (Tex. App. San Antonio 2008), review granted, (Oct. 1, 2010) and judgment rev'd on other grounds, 342 S.W.3d 59 (Tex. 2011).
- 11 [AIU Ins. Co. v. Deajess Medical Imaging, P.C.](#), 24 Misc. 3d 161, 882 N.Y.S.2d 812 (Sup 2009).

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IV. False Representations

D. Matters of Law

2. Exceptions to Rule of Nonliability

§ 104. Mixed law and fact; factual statement regarding legal matters

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West's Key Number Digest

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A representation of mixed law and fact may constitute the basis for an action in fraud¹ if it amounts to an implied assertion that facts exist that justify the conclusion of law which is expressed and the other party would ordinarily have no knowledge of the facts.² Moreover, while misstatements of law alone will not generally constitute fraud, they may, when such misstatements are accompanied by concealment or misrepresentation of facts, be made the basis of a charge of fraud.³

Observation:

A statement referring to the occurrence of a specific legal event is factual, for the purpose of a fraudulent misrepresentation claim, only if the event has already occurred or is presently occurring and if it goes beyond opinion, conjecture, speculation, and prediction.⁴

Footnotes

- 1 [Cucchiaro v. Cucchiaro](#), 165 Misc. 2d 134, 627 N.Y.S.2d 224 (Sup 1995) (false mixed statement of fact as to what the law is or whether it is applicable); [Goerig v. Elliott](#), 27 Wash. 2d 600, 179 P.2d 320 (1947). Since a misrepresentation as to the law may give rise to an action for fraud, so may a misrepresentation as to a mixed question of fact and law, such as eligibility for reimbursement under the no-fault insurance laws. [AIU Ins. Co. v. Deajess Medical Imaging, P.C.](#), 24 Misc. 3d 161, 882 N.Y.S.2d 812 (Sup 2009).
- 2 [Hoyt Properties, Inc. v. Production Resource Group, L.L.C.](#), 736 N.W.2d 313 (Minn. 2007). Where the facts upon which a statement of law is based are misrepresented, there may be actionable fraud. [Sorensen v. Gardner](#), 215 Or. 255, 334 P.2d 471 (1959).
- 3 [Sorensen v. Gardner](#), 215 Or. 255, 334 P.2d 471 (1959); [Goerig v. Elliott](#), 27 Wash. 2d 600, 179 P.2d 320 (1947).
- 4 [In re Midway Airlines, Inc.](#), 180 B.R. 851 (Bankr. N.D. Ill. 1995) (applying Illinois law).

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2. Exceptions to Rule of Nonliability

§ 105. Foreign law; law of another state

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[Misrepresentation as to matters of foreign law as actionable, 24 A.L.R.2d 1039](#)

As a general rule, representations as to the law of a foreign state are regarded as representations of fact. A misrepresentation as to that law is therefore a fraud.¹ This rule has been applied, for instance, to misrepresentations of the foreign law of insurance,² of foreign automobile registration law,³ and of foreign irrigation law.⁴ Nevertheless, in some jurisdictions, the actionability of the representations may be regarded as limited to those made in bad faith.⁵

Reminder:

Even where a legal opinion is regarded as such, it may still be actionable where it misrepresents the facts on which it is based or implies the existence of facts which are nonexistent.⁶

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Footnotes

- 1 Bowman v. City of Indianapolis, 133 F.3d 513 (7th Cir. 1998) (applying Indiana law); Hembry v. Parreco, 81 A.2d 77, 24 A.L.R.2d 1034 (Mun. Ct. App. D.C. 1951); Travelers' Protective Ass'n of America v. Smith, 183 Ind. 59, 107 N.E. 283 (1914); State v. Edwards, 178 Minn. 446, 227 N.W. 495, 65 A.L.R. 1253 (1929); Arroyo Shrimp Farm, Inc. v. Hung Shrimp Farm, Inc., 927 S.W.2d 146 (Tex. App. Corpus Christi 1996).
- 2 Rauen v. Prudential Ins. Co. of America, 129 Iowa 725, 106 N.W. 198 (1906).
- 3 Hembry v. Parreco, 81 A.2d 77, 24 A.L.R.2d 1034 (Mun. Ct. App. D.C. 1951).
- 4 Epp v. Hinton, 91 Kan. 513, 138 P. 576 (1914), opinion modified on other grounds on denial of reh'g, Epp v. Hinton, 91 Kan. 919, 139 P. 379 (1914).
- 5 Miller v. McGinnis, 285 Mich. 28, 280 N.W. 96 (1938).
- 6 § 104.

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37 Am. Jur. 2d Fraud and Deceit § 106

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Fraud and Deceit

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IV. False Representations

E. Falsity

§ 106. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  13(.5), 13(1)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 69](#) (Answer—Defense—Denial of falsity of representations)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 207](#) (Instructions to jury—Elements of fraud—General form)

It is fundamental in the law of fraud that a representation must be false to warrant a basis for relief.¹ It follows that unless a false impression is deliberately created by its use,² a representation that was true cannot serve as a basis for a claim of fraud.³ However, a representation can be technically accurate, yet still misleading, for purposes of negligent and intentional misrepresentation claims.⁴

In order to establish a case of false representation it is not necessary that something that is false have been stated as if it were true, it being sufficient that a false impression have been produced in the mind of the other party.⁵ It is immaterial that no specific statement in a prospectus is false if the general impression conveyed by it is false.⁶ Moreover, if by a number of statements one intentionally gives a false impression and induces another to act upon it, it is not the less false, even though, if each statement is taken by itself, there may be difficulty in showing that any specific statement is untrue.⁷

Caution:

The fact that false representations were made in good faith will not exonerate the party making the representations.⁸

The determination in a fraud action of the meaning of representations and their truth or falsity is to be made in light of the meaning that the plaintiffs would reasonably attach to the statements in the existing circumstances, and the words employed must be considered against the background and in the context in which they were used.⁹ The falsity of statements made in the course of negotiations for a final settlement of the rights of parties to a contract, relative to what obligations are imposed by the contract and to the effect of the failure to make a settlement, is a question of law and not of fact.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Term "fraud," as commonly used, typically requires a false statement or omission. [Bullock v. BankChampaign, N.A., 133 S. Ct. 1754 \(2013\).](#)

An essential element of fraud is that there be a false representation of a material fact which either exists in the present or has existed in the past. [NDCC 9–03–08. Ward Farms Partnership v. Enerbase Co-op. Resources, 2015 ND 136, 863 N.W.2d 868 \(N.D. 2015\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [U.S. v. Beebe, 180 U.S. 343, 21 S. Ct. 371, 45 L. Ed. 563 \(1901\); Prestwood v. City of Andalusia, 709 So. 2d 1173 \(Ala. 1997\); Turner v. Milliman, 392 S.C. 116, 708 S.E.2d 766 \(2011\); Hennig v. Ahearn, 230 Wis. 2d 149, 601 N.W.2d 14 \(Ct. App. 1999\).](#)
- 2 [Sawyer v. Prickett, 86 U.S. 146, 22 L. Ed. 105, 1873 WL 15933 \(1873\).](#)
- 3 [Sawyer v. Prickett, 86 U.S. 146, 22 L. Ed. 105, 1873 WL 15933 \(1873\); Spreitzer v. Hawkeye State Bank, 779 N.W.2d 726 \(Iowa 2009\); Sonterra Capital Partners, Ltd. v. Sonterra Property Owners Ass'n, Inc., 216 S.W.3d 417 \(Tex. App. San Antonio 2006\).](#)
- 4 [Grove Holding Corp. v. First Wisconsin Nat. Bank of Sheboygan, 12 F. Supp. 2d 885, 41 Fed. R. Serv. 3d 1595 \(E.D. Wis. 1998\).](#)
- 5 [McClellan v. Tobin, 219 Ind. 563, 39 N.E.2d 772 \(1942\).](#)
- 6 [McClellan v. Tobin, 219 Ind. 563, 39 N.E.2d 772 \(1942\); Downey v. Finucane, 205 N.Y. 251, 98 N.E. 391 \(1912\).](#)
- 7 [Downey v. Finucane, 205 N.Y. 251, 98 N.E. 391 \(1912\).](#)

- 8 [Monroe v. Mercer](#), 414 S.W.2d 756 (Tex. Civ. App. Houston 1967), writ dismissed, (Oct. 4, 1967).
9 [Haberstick v. Gordon A. Gundaker Real Estate Co., Inc.](#), 921 S.W.2d 104 (Mo. Ct. App. E.D. 1996).
10 [Benz v. Zobel](#), 255 Wis. 542, 39 N.W.2d 713, 13 A.L.R.2d 795 (1949).

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37 Am. Jur. 2d Fraud and Deceit § 107

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IV. False Representations

E. Falsity

§ 107. Substantiality; partial truths

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  13(.5), 13(1)

Trial Strategy

[Real Estate Broker's Liability for Misrepresentation of Income, Earnings, or Profits from Property Sold, 59 Am. Jur. Proof of Facts 3d 511](#)

[Liability of Seller in Residential Real Estate Transaction for Misrepresentation Under "As Is" Contract, 59 Am. Jur. Proof of Facts 3d 463](#)

Fraudulent representations may consist of half-truths calculated to deceive.¹ It is well established in some states that concealment of a material fact, when combined with a "half truth" or other misleading statement, is a ground for the rescission of a contract of sale.² A false statement required to prove fraudulent misrepresentation may include a half-truth which, although technically accurate, is misleading because it omits important qualifying information which, had it been known, would have caused the plaintiff to act differently.³

However, no relief on the basis of misrepresentations, either by way of rescission or recovery of money, will be given where the representations are not false in a material and substantial respect.⁴ Thus, statements which are substantially true will not support an action for rescission or recovery of damages for deceit.⁵

Footnotes

- 1 [United Parcel Service Co. v. Rickert](#), 996 S.W.2d 464 (Ky. 1999); [Knights of Columbus Council 3152 v. KFS BD, Inc.](#), 280 Neb. 904, 791 N.W.2d 317 (2010); [American Empire Life Ins. Co. v. Long](#), 344 S.W.2d 513 (Tex. Civ. App. Eastland 1961), writ refused n.r.e., (June 14, 1961).
A representation stating the truth so far as it goes but which the maker knows or believes to be materially misleading because of his or her failure to state additional or qualifying matter is a fraudulent misrepresentation. [Restatement Second, Torts § 529](#).
- 2 [Farnsworth v. Feller](#), 256 Or. 56, 471 P.2d 792 (1970).
- 3 [Integrated Genomics, Inc. v. Gerngross](#), 636 F.3d 853, 266 Ed. Law Rep. 48 (7th Cir. 2011) (applying Illinois law).
- 4 [Pedone v. Title Guarantee & Trust Co.](#), 280 N.Y. 153, 19 N.E.2d 1000 (1939).
- 5 [First Nat. Bank v. Level Club](#), 254 A.D. 255, 4 N.Y.S.2d 734 (1st Dep't 1938), judgment aff'd, 282 N.Y. 577, 24 N.E.2d 991 (1939).

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IV. False Representations

E. Falsity

§ 108. Time for determining falsity; effect of subsequent changes

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  13(.5), 13(1)

Trial Strategy

[Real Estate Broker's Liability for Misrepresentation of Income, Earnings, or Profits from Property Sold, 59 Am. Jur. Proof of Facts 3d 511](#)

[Liability of Seller in Residential Real Estate Transaction for Misrepresentation Under "As Is" Contract, 59 Am. Jur. Proof of Facts 3d 463](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 217](#) (Instructions to jury—Truth or falsity of representation must be determined as of time representation was made—Effect of subsequent changes)

Except where it may be regarded as continuing in character,¹ the truth or falsity of a representation is generally to be determined as of the time it was made.² In other words, a representation must be false at the time it was made to support a claim of fraud.³ Accordingly, a person cannot be held liable for misrepresentation when the person's statement was true at the time it was made,⁴ nor can a person be held responsible for changes in the law that occurred later.⁵ Thus, if the expression of a state of mind or

existing purpose was true when made and was made in good faith, then any subsequent change of purpose made in good faith is not material to the transaction.⁶ There is also authority, however, that the truth or falsity of representations must be determined as of the date they were acted upon.⁷

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Footnotes

- 1 [Childress v. Nordman](#), 238 N.C. 708, 78 S.E.2d 757 (1953).
As to continuing representations, see § 233.
- 2 [Tom Hughes Marine, Inc. v. American Honda Motor Co., Inc.](#), 219 F.3d 321 (4th Cir. 2000).
- 3 [Spreitzer v. Hawkeye State Bank](#), 779 N.W.2d 726 (Iowa 2009); [Mukhopadhyay v. Genesis Corp.](#), 70 A.D.3d 520, 894 N.Y.S.2d 430 (1st Dep't 2010); [Parker v. Byrne](#), 996 A.2d 627 (R.I. 2010).
- 4 [In re Fidelity/Apple Securities Litigation](#), 986 F. Supp. 42 (D. Mass. 1997); [Interim Healthcare of Northeast Ohio, Inc. v. Interim Services, Inc.](#), 12 F. Supp. 2d 703 (N.D. Ohio 1998).
- 5 [Interim Healthcare of Northeast Ohio, Inc. v. Interim Services, Inc.](#), 12 F. Supp. 2d 703 (N.D. Ohio 1998).
- 6 [Powers v. Shore](#), 248 S.W.2d 1 (Mo. 1952).
- 7 [Pasko v. Trela](#), 153 Neb. 759, 46 N.W.2d 139 (1951).
The truth or falsity of a representation is generally to be determined as of the time when it was made and as of the time it was intended to be and was relied upon and acted upon. [Renaissance Leasing, LLC v. Vermeer Mfg. Co.](#), 322 S.W.3d 112 (Mo. 2010).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 109. Fraudulent intent, generally

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[Specific intent to defraud Government as necessary to impose liability under provisions of False Claims Act \(31 U.S.C.A. sec. 231\) pertaining to "false" or "fictitious" claims or statements, 26 A.L.R. Fed. 307](#)

Trial Strategy

[Real Estate Broker's Liability for Misrepresentation of Income, Earnings, or Profits from Property Sold, 59 Am. Jur. Proof of Facts 3d 511](#)

[Liability of Seller in Residential Real Estate Transaction for Misrepresentation Under "As Is" Contract, 59 Am. Jur. Proof of Facts 3d 463](#)

Forms

Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 207 (Instructions to jury—Elements of fraud—General form)

It has often been broadly stated that fraudulent misrepresentation is an intentional tort¹ and that fraud involves the idea of intentional deception.² Accordingly, while fraud liability is sometimes imposed for reckless,³ negligent,⁴ and even innocent⁵ misrepresentations, a fraudulent intent,⁶ i.e., an intent to deceive⁷ or mislead,⁸ is generally an essential element of actual fraud. It has been said in this regard that "scienter" is a mental state embracing intent to deceive, manipulate, or defraud.⁹

An "intent to defraud" involves a material representation that one knows to be false or what amounts to the same thing: an omission that one knows will create an erroneous impression.¹⁰ In order to show an intent to deceive, as required to establish liability for fraud, plaintiffs must show that the defendant knew, at the time representations were made, that they were false.¹¹ A party's intent is determined at the time of the representation challenged as fraudulent, but it may be inferred from the party's acts after the representation was made,¹² and a party is considered to intend the necessary consequences of its acts that are later challenged as fraudulent.¹³ Where an act is originally tainted with a fraudulent intent, the subsequent abandonment of the intent is ineffectual as against an innocent person who is injured by the act.¹⁴

Allegations of a mere breach of contract will ordinarily not suffice to support a finding of fraudulent intent.¹⁵ Moreover, in an action for fraud, a defendant's good faith and reasonable reliance on counsel may negate the culpable intent that is necessary to liability.¹⁶

The element of intent makes fraud actionable regardless of any contractual or fiduciary duty one party might owe to the other.¹⁷

Observation:

An action of deceit is to be distinguished from one for breach of warranty, the one sounding in tort and the other in contract,¹⁸ and in an action on a warranty, moreover, it is sufficient to show that a material warranty has failed,¹⁹ and where such is the case, scienter need not be alleged or proved.²⁰

CUMULATIVE SUPPLEMENT

Cases:

In action asserting claims for fraud, plaintiff must plead specific facts establishing intent, that is, evidence demonstrating that the defendant knew the alleged representation was false or misleading. *Natale v. Espy Corp.*, 2 F. Supp. 3d 93 (D. Mass. 2014).

To plead fraud under New York law, although a plaintiff need not allege scienter in detail, it must allege facts that are at least suggestive of intent to defraud, which may be done either by alleging a motive for the commission of a fraud or by identifying circumstances indicating conscious behavior by the defendants. [In re LightSquared Inc.](#), 504 B.R. 321 (Bankr. S.D. N.Y. 2013).

Specific intent to deceive is a necessary element of fraud. [LSA—C.C. art. 1953](#). [Lomont v. Bennett](#), 172 So. 3d 620 (La. 2015).

Prescription drug manufacturers had an intent to deceive Mississippi Division of Medicaid (Medicaid) regarding the average wholesale price (AWP) of generic drugs, as element required for the State to prove fraud in its action alleging that manufacturers inflated reported prices, which caused Medicaid to reimburse pharmacies at the inflated rates; manufacturers and others in the industry "marketed the spread" to pharmacies, which encouraged them to use manufacturers' products in order to return a greater profit and increase the individual market share of their drugs, AWP was a "tactic" and could be adjusted to be more competitive in the area of reimbursement, and manufacturers published their AWP with knowledge that Medicaid would see and use it in its reimbursement calculations. [Watson Laboratories, Inc. v. State](#), 241 So. 3d 573 (Miss. 2018).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Kramer v. Petisi](#), 285 Conn. 674, 940 A.2d 800 (2008).
- 2 [Gregory v. Consolidated Utilities](#), 186 Ark. 406, 53 S.W.2d 854 (1932); [In re Estate of Lane](#), 39 Kan. App. 2d 1062, 188 P.3d 23 (2008) (fraud requires intentional deception).
- 3 [§ 122](#).
- 4 [§§ 128 to 130](#).
- 5 [§§ 116, 121](#).
- 6 [South Branch Lumber Co. v. Ott](#), 142 U.S. 622, 12 S. Ct. 318, 35 L. Ed. 1136 (1892); [Froelich v. Erickson](#), 96 F. Supp. 2d 507 (D. Md. 2000), [aff'd](#), 5 Fed. Appx. 287 (4th Cir. 2001); [Anglin v. Anglin](#), 30 So. 3d 746 (La. Ct. App. 1st Cir. 2009).
18 U.S.C.A. § 1001 requires that statements be made with an intent to deceive, designed to induce a belief in the falsity or to mislead, but not an intent to defraud. [U.S. v. Lichenstein](#), 610 F.2d 1272 (5th Cir. 1980). As to intent to deceive or defraud as essential to claim of constructive fraud, see [§ 8](#).
- 7 [Linville v. Ginn Real Estate Co., LLC](#), 697 F. Supp. 2d 1302 (M.D. Fla. 2010) (applying Florida law); [Russell v. Southern National Foods, Inc.](#), 754 So. 2d 1246 (Miss. 2000); [Matter of Drummond](#), 123 N.M. 727, 1997-NMCA-094, 945 P.2d 457 (Ct. App. 1997); [Baker v. City of Robinson](#), 305 S.W.3d 783 (Tex. App. Waco 2009), review denied, (Oct. 22, 2010).
- 8 [Fairbanks Mobile Wash, Inc. v. Hubbell](#), 2009-Ohio-558, 2009 WL 294936 (Ohio Ct. App. 12th Dist. Warren County 2009); [Merten v. Portland General Elec. Co.](#), 234 Or. App. 407, 228 P.3d 623 (2010), review denied, 348 Or. 669, 237 P.3d 824 (2010).
- 9 [S.E.C. v. Retail Pro, Inc.](#), 673 F. Supp. 2d 1108 (S.D. Cal. 2009).
- 10 [In re Chavin](#), 150 F.3d 726 (7th Cir. 1998).
- 11 [Abrahami v. UPC Const. Co., Inc.](#), 224 A.D.2d 231, 638 N.Y.S.2d 11 (1st Dep't 1996).
Knowledge of falsity, generally, see [§§ 119 to 123](#).
- 12 [World Help v. Leisure Lifestyles, Inc.](#), 977 S.W.2d 662 (Tex. App. Fort Worth 1998).
- 13 [Peter J. Hartmann Co. v. Capital Bank and Trust Co.](#), 296 Ill. App. 3d 593, 230 Ill. Dec. 830, 694 N.E.2d 1108 (1st Dist. 1998).
Evidence establishing conscious disregard of another's rights is evidence indicating that the defendant was aware of the probable consequences of his or her acts and willfully and deliberately failed to avoid those consequences, for purposes of a fraud claim. [Notrica v. State Compensation Ins. Fund](#), 70 Cal. App. 4th 911, 83 Cal. Rptr. 2d 89 (2d Dist. 1999).
- 14 [Gregory v. Consolidated Utilities](#), 186 Ark. 406, 53 S.W.2d 854 (1932).

- 15 ESI, Inc. v. Coastal Corp., 61 F. Supp. 2d 35 (S.D. N.Y. 1999).
16 United Orient Bank v. Green, 215 B.R. 916 (S.D. N.Y. 1997), *aff'd*, 172 F.3d 38 (2d Cir. 1999).
17 Agricultural Ins. Co. v. Superior Court, 70 Cal. App. 4th 385, 82 Cal. Rptr. 2d 594 (2d Dist. 1999).
18 § 15.
19 Am. Jur. 2d, Sales §§ 625 to 641.
20 Am. Jur. 2d, Sales § 634.

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 110. Intent to induce reliance, generally

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In some jurisdictions, common law fraud requires an intent to induce a plaintiff to act in reliance on the defendant's misrepresentation,¹ or the plaintiff must prove that the defendant sought to obtain an undue advantage from the misrepresentation.²

An "intent to induce," for purposes of a fraud claim, requires more than mere foreseeability; rather, the maker must have at least reason to expect that the recipient will rely.³

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Footnotes

- ¹ [NACCO Industries, Inc. v. Applicia Inc.](#), 997 A.2d 1 (Del. Ch. 2009); [Country Cove Development, Inc. v. May](#), 143 Idaho 595, 150 P.3d 288 (2006); [Ferdico v. Zweig](#), 82 A.D.3d 1151, 919 N.Y.S.2d 521 (2d Dep't 2011); [Johnson v. Miller](#), 2012 SD 61, 818 N.W.2d 804 (S.D. 2012); [Matis v. Golden](#), 228 S.W.3d 301 (Tex. App. Waco 2007); [Van Lare v. Vogt, Inc.](#), 2004 WI 110, 274 Wis. 2d 631, 683 N.W.2d 46 (2004) (intent to deceive and induce the plaintiff to act upon the misrepresentation to the plaintiff's pecuniary damage).
- ² [Automated Salvage Transport, Inc. v. NV Koninklijke KNP BT](#), 106 F. Supp. 2d 606 (D.N.J. 1999).
- ³ [Prospect High Income Fund v. Grant Thornton, LLP](#), 203 S.W.3d 602 (Tex. App. Dallas 2006), order withdrawn, (Aug. 29, 2008) and judgment rev'd in part on other grounds, 314 S.W.3d 913 (Tex. 2010).

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37 Am. Jur. 2d Fraud and Deceit § 111

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 111. Necessity of intent that representation be communicated to, deceive, and be acted upon by complainant

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West's Key Number Digest

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Trial Strategy

[Real Estate Broker's Liability for Misrepresentation of Income, Earnings, or Profits from Property Sold, 59 Am. Jur. Proof of Facts 3d 511](#)

[Liability of Seller in Residential Real Estate Transaction for Misrepresentation Under "As Is" Contract, 59 Am. Jur. Proof of Facts 3d 463](#)

A representation, even though knowingly false, does not constitute grounds for an action of deceit unless it is made with the intent to be communicated to the persons, or to a class of persons, who act upon it to their prejudice.¹ In other words, in order for a defendant to be liable for fraud, he or she must intend that a particular representation or concealment be relied upon by a specific person or persons.² The intent-to-induce-reliance element of a fraud does not depend on traditional privity and may be established by a "reason to expect" reliance.³

If it does not appear that representations were made to the complainant, or with any expectation that they would come to the complainant's knowledge, or with any belief or reason to believe that they would induce the complainant to act in the manner in question, there is no liability.⁴

CUMULATIVE SUPPLEMENT

Cases:

Under Kansas law, a key element of a fraud claim is a misrepresentation made to the injured party; a fraud claim is not actionable if the misrepresentation was made to a third party. [Atkins v. Heavy Petroleum Partners, LLC](#), 86 F. Supp. 3d 1188 (D. Kan. 2015).

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Footnotes

- 1 [Baker v. R.T. Vanderbilt Co. Inc.](#), 260 A.D.2d 750, 688 N.Y.S.2d 726 (3d Dep't 1999).
To state a claim for fraudulent misrepresentation under Michigan law, a plaintiff must allege that the defendant's misrepresentation was made with the intent or knowledge that it would be communicated to the plaintiff with the intent to deceive him or her. [Bennett v. MIS Corp.](#), 607 F.3d 1076 (6th Cir. 2010).
- 2 [Shapiro v. Sutherland](#), 64 Cal. App. 4th 1534, 76 Cal. Rptr. 2d 101 (2d Dist. 1998).
One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons whom he or she intends or has reason to expect to act or to refrain from action in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he or she intends or has reason to expect their conduct to be influenced. [Restatement Second, Torts § 531](#).
- 3 [Ernst & Young, L.L.P. v. Pacific Mut. Life Ins. Co.](#), 51 S.W.3d 573 (Tex. 2001).
- 4 [Western Union Telegraph Co. v. Schriver](#), 141 F. 538 (C.C.A. 8th Cir. 1905).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 112. Representations made directly or indirectly

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[Liability of Seller in Residential Real Estate Transaction for Misrepresentation Under "As Is" Contract, 59 Am. Jur. Proof of Facts 3d 463](#)

While some connection, direct or indirect, between a party charged with making false representations and a party relying thereon must be shown, it is not essential, in support of a cause of action for damages resulting from false representations, that the false representations be shown to have been made directly to the party claiming to have relied upon them.¹ Accordingly, where a party makes false representations to another with the intent or knowledge that they be exhibited or repeated to a third party for the purpose of deceiving the third party, the third party, if so deceived and injured, can maintain an action in tort against the party making the false statements for the damages resulting from the fraud.² In other words, in order to recover for representations made to a third person, it must have been intended that they be communicated to and acted upon by the complaining party³ since otherwise the complaining party has no right to rely on them⁴ and does so at the complaining party's own risk.⁵ Similarly, if representations are made to one person with the intention that a third person alone shall act upon them, the person to whom they are made cannot maintain an action for deceit against the person making them even though the person acts upon the

representations and suffers damage, but the fact that representations were intended to deceive the person to whom they were made, as well as a third person, will not affect the rights of the latter.⁶ Of course, even though indirect representations are actionable if it is intended that the defrauded person act on such representations, the principle is limited by the qualification that nevertheless the actor in the particular transaction must have been authorized so to act or have had the right to act.⁷

CUMULATIVE SUPPLEMENT

Cases:

Employer's chairman of board was liable in his individual capacity on claim for fraudulent inducement by employee who was induced to leave his prior employment and enter into executive employment contract, despite chairman's claim that he was acting at all times as agent for employer, where chairman knew at time he misrepresented his authority to bind employer to contract that he had no such authority. [Wilmot v. Bouknight](#), 466 S.W.3d 219 (Tex. App. Houston 1st Dist. 2015), reh'g overruled, (July 28, 2015) and petition for review filed, (Aug. 12, 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Gulf Oil Corp. of Pennsylvania v. Newton](#), 130 Conn. 37, 31 A.2d 462 (1943); [Oppenhuizen v. Wennersten](#), 2 Mich. App. 288, 139 N.W.2d 765 (1966); [Johnson v. Sachs](#), 7 A.D.2d 939, 181 N.Y.S.2d 862 (3d Dep't 1959).
Indirect reliance allows a plaintiff to prove a fraud action when he or she heard a statement not from the party that defrauded him or her but from that party's agent from someone to whom the party communicated the false statement with the intent that the victim hear it, rely on it, and act to his or her detriment. [Kaufman v. i-Stat Corp.](#), 165 N.J. 94, 754 A.2d 1188 (2000).
- 2 [Gulf Oil Corp. of Pennsylvania v. Newton](#), 130 Conn. 37, 31 A.2d 462 (1943); [Oppenhuizen v. Wennersten](#), 2 Mich. App. 288, 139 N.W.2d 765 (1966).
The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other and that it will influence his or her conduct in the transaction or type of transaction involved. [Restatement Second, Torts § 533](#).
As to statements or representations of financial condition furnished to commercial agencies, see [§ 254](#).
- 3 [Kaufman v. i-Stat Corp.](#), 165 N.J. 94, 754 A.2d 1188 (2000).
- 4 [§ 232](#).
- 5 [Oppenhuizen v. Wennersten](#), 2 Mich. App. 288, 139 N.W.2d 765 (1966).
- 6 [Oppenhuizen v. Wennersten](#), 2 Mich. App. 288, 139 N.W.2d 765 (1966).
- 7 [Hindman v. First Nat. Bank](#), 112 F. 931 (C.C.A. 6th Cir. 1902); [Cheney v. Dickinson](#), 172 F. 109 (C.C.A. 7th Cir. 1909); [Henry v. Dennis](#), 95 Me. 24, 49 A. 58 (1901).

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37 Am. Jur. 2d Fraud and Deceit § 113

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 113. Representations made directly or indirectly—Complainant in contemplation of one making indirect representation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  4

[Real Estate Broker's Liability for Misrepresentation of Income, Earnings, or Profits from Property Sold, 59 Am. Jur. Proof of Facts 3d 511](#)

The principle that false representations made to one party with the intent that another act thereon are actionable in favor of the latter¹ applies where representations made are not specifically intended for the particular person who acts upon them to his or her injury, if such person may be deemed to be within the reasonable contemplation of the party making the false representations and has the right to rely upon them.² This principle has been applied so as to give a right of action to a corporation which has acted to its damage upon false representations made to promoters or organizers of the corporation prior to its formation.³ It has been applied to representations made to a member of a partnership and acted on by the firm even though the representor did not know that the partnership existed,⁴ to representations made by an assignor,⁵ and to representations made to a husband or wife and acted upon by the other spouse.⁶

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Footnotes

¹ § 112.

² [Hindman v. First Nat. Bank](#), 112 F. 931 (C.C.A. 6th Cir. 1902).

One who sold a car to a dealer knowing that the title was forged has been held liable to a buyer of the car from the dealer for compensatory and exemplary damages. [Oppenhuizen v. Wennersten](#), 2 Mich. App. 288, 139 N.W.2d 765 (1966).

One who makes a fraudulent misrepresentation intending or with reason to expect that more than one person or class of persons will be induced to rely on it, or that there will be action or inaction in more than one transaction or type of transaction, is subject to liability for pecuniary loss to any one of such persons justifiably relying upon the misrepresentation in any one or more of such transactions. [Restatement Second, Torts § 534](#).

3 [Iowa Economic Heater Co. v. American Economic Heater Co.](#), 32 F. 735 (C.C.N.D. Ill. 1887); [Schoefield Gear & Pulley Co. v. Schofield](#) (State Report Title: [Scholfield Gear & Pulley Co. v. Scholfield](#)), 71 Conn. 1, 40 A. 1046 (1898).

4 [Henry v. Dennis](#), 95 Me. 24, 49 A. 58 (1901).

5 [Johnson v. Sachs](#), 7 A.D.2d 939, 181 N.Y.S.2d 862 (3d Dep't 1959).

6 [Hunter v. McKenzie](#), 197 Cal. 176, 239 P. 1090 (1925).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 114. Representations to class of persons or public

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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Where false representations are made to a particular class of persons¹ or to the public generally,² they must, in order to form the basis of liability, have been intended to influence a complaining party as one of the public or one of such class. In such case, however, an intent to deceive the plaintiff in particular is not necessary, but it is sufficient that there was an intent to defraud any person falling within the category for whom the representations are made who may act on them.³ It is enough that the complaining party was entrapped by them and that they were designed to entrap someone.⁴ It has been said that one who intends to defraud the public or a particular class of persons is deemed to have intended to defraud every individual in that class who is actually misled.⁵ However, a plaintiff who fails to show that he or she is one of a class to which representations were intended to be addressed cannot base an action in deceit thereon.⁶

CUMULATIVE SUPPLEMENT

Cases:

Consumer adequately alleged an affirmative misrepresentation fraud claim against operator of pharmacy under common law and Arizona Consumer Fraud Act (CFA) regarding developer's blood tests which used a tiny drop of blood for analysis, by alleging that consumer relied on marketing by operator and developer regarding reliability of their services, including on websites and in press releases which consumer read before visiting pharmacy for blood tests, and that operator was aware, or should have been aware, of fraud before consumer purchased tests. [Ariz. Rev. Stat. Ann. § 44-1528\(A\)\(3\)](#). [In re Arizona Theranos, Inc., Litigation](#), 308 F. Supp. 3d 1026 (D. Ariz. 2018).

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Footnotes

- 1 Gulf Oil Corp. of Pennsylvania v. Newton, 130 Conn. 37, 31 A.2d 462 (1943); Webb v. Rockefeller, 195 Mo. 57, 93 S.W. 772 (1906).
- 2 Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931); Puffer v. Welch, 144 Wis. 506, 129 N.W. 525 (1911).
- 3 Gulf Oil Corp. of Pennsylvania v. Newton, 130 Conn. 37, 31 A.2d 462 (1943); Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931).
- 4 Nye Odorless Incinerator Corp. v. Felton, 35 Del. 236, 162 A. 504 (Super. Ct. 1931); Campbell v. Gooch, 131 Kan. 456, 292 P. 752 (1930).
- 5 Wennerholm v. Stanford University School of Medicine, 20 Cal. 2d 713, 128 P.2d 522, 141 A.L.R. 1358 (1942).
- 6 Van Swall v. Derschug, 235 A.D. 387, 257 N.Y.S. 206 (4th Dep't 1932).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 115. Representations to class of persons or public—Reports, certificates, or statements required to be filed with public officials

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  4

The principle that false representations made to one person with the intention that another act thereon are actionable in favor of such actor has frequently been applied where a party has sustained damages as a result of relying upon false information contained in a report, certificate, or statement required by statute to be filed with certain public officials.¹ This principle is limited in operation to reports, in some way disseminating, and meant to disseminate, information to the public.² If the certificate required by statute is not addressed to the public or intended for public information, but is required by law for a different purpose, such as a condition precedent to doing business within a state, liability cannot be predicated for false representations therein contained which cause loss to a member of the public acting thereon.³ Nevertheless, whether the information in a report required by law to be filed is for general public consumption or solely to influence the action of certain state officials, the person furnishing the false information in the report is liable to one injured by action thereon if the maker of the report is requested to give information concerning the affairs of the company involved in the report and refers such inquirer to the report for information.⁴ Such reference is a repetition of the representation addressed directly to the questioner and renders the informant liable irrespective of the original purpose for which the report or certificate was given.⁵

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Footnotes

- ¹ [Warfield v. Clark](#), 118 Iowa 69, 91 N.W. 833 (1902); [Ver Wys v. Vander Mey](#), 206 Mich. 499, 173 N.W. 504 (1919).

Statutory liability for false representations contained in reports required by law may rest on a different basis from common law deceit and may constitute a wholly statutory cause of action and method of enforcement unknown to the common law. [Union Market Nat. Bank of Watertown v. Gardiner](#), 276 Mass. 490, 177 N.E. 682, 79 A.L.R. 1512 (1931).

If a statute requires information to be furnished, filed, recorded, or published for the protection of a particular class of persons, one who makes a fraudulent misrepresentation in so doing is subject to liability to the persons for pecuniary loss suffered through their justifiable reliance upon the misrepresentation in a transaction of the kind in which the statute is intended to protect them. [Restatement Second, Torts § 536](#).

As to the liability of corporate officials for false information in reports, certificates, etc., filed generally, see [Am. Jur. 2d, Corporations §§ 1636, 1637](#).

As to deceit actions, apart from special statutory relief, maintainable against bank officials who are required by law to publish certain reports and statements and have made such reports with false information, see [Am. Jur. 2d, Banks and Financial Institutions §§ 405, 419, 420](#).

2 [Webb v. Rockefeller](#), 195 Mo. 57, 93 S.W. 772 (1906).

3 [Hindman v. First Nat. Bank](#), 112 F. 931 (C.C.A. 6th Cir. 1902); [McKee v. Rudd](#), 222 Mo. 344, 121 S.W. 312 (1909); [Webb v. Rockefeller](#), 195 Mo. 57, 93 S.W. 772 (1906).

4 [Hindman v. First Nat. Bank](#), 112 F. 931 (C.C.A. 6th Cir. 1902).

5 [Hindman v. First Nat. Bank](#), 112 F. 931 (C.C.A. 6th Cir. 1902).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 116. Views dispensing with or modifying requirement of intent to deceive; statutes

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  4

In some jurisdictions the rule is broadly stated that intent to deceive is not a necessary element of an action at law for fraud to recover damages.¹ In one state, any representations that are false in fact and actually deceive the other, and are relied on by a person to that person's damage, are actionable, irrespective of whether the person making them acted in good faith in making them where the loss of the party deceived inures to the benefit of the other.² Where an intent to deceive is not an element of fraud, the intent or good faith of a representor is not in issue and is not controlling.³

Observation:

The crucial difference between fraud and gross mistakes amounting to fraud is the necessity of an intent to deceive.⁴

One may be guilty of violating a statute condemning certain misrepresentations without an intent to defraud.⁵ Likewise, a statute may dispense with the necessity of an intent to deceive if an innocent misrepresentation is acted upon by the party to whom it is made⁶ or require a different kind of intent.⁷

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Footnotes

- 1 [Damon v. Sun Co., Inc.](#), 87 F.3d 1467 (1st Cir. 1996) (applying Massachusetts law); [Foiles v. Midwest Street Rod Ass'n of Omaha, Inc.](#), 254 Neb. 552, 578 N.W.2d 418 (1998).
- 2 [Rosenberg v. Cyrowski](#), 227 Mich. 508, 198 N.W. 905 (1924).
- 3 [McDaniel v. Hodges](#), 176 Va. 519, 11 S.E.2d 623 (1940).
- 4 [BMY Combat Systems Div. of Harsco Corp. v. U.S.](#), 38 Fed. Cl. 109 (1997).
- 5 [People v. Richter's Jewelers, Inc.](#), 291 N.Y. 161, 51 N.E.2d 690, 150 A.L.R. 560 (1943).
- 6 [Gulf Electric Co. v. Fried](#), 218 Ala. 684, 119 So. 685 (1928).
- 7 [Gagne v. Bertran](#), 43 Cal. 2d 481, 275 P.2d 15 (1954).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 117. Immateriality of motive

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  4

It is well settled that if fraud is established, the motive of the guilty party is immaterial.¹ While it is a significant fact tending to prove fraud, that a speaker profited by a misrepresentation,² a speaker may be guilty of fraud although the speaker acted without the motive of personal gain³ or without having in fact derived any benefit or advantage from making the false representation.⁴

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Footnotes

- 1 [Claflin v. Commonwealth Ins. Co.](#), 110 U.S. 81, 3 S. Ct. 507, 28 L. Ed. 76 (1884); [Peter J. Hartmann Co. v. Capital Bank and Trust Co.](#), 296 Ill. App. 3d 593, 230 Ill. Dec. 830, 694 N.E.2d 1108 (1st Dist. 1998); [Spiess v. Brandt](#), 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950).
- 2 [§ 33.](#)
- 3 [Whiting v. Price](#), 169 Mass. 576, 48 N.E. 772 (1897); [McDonald v. McNeil](#), 92 Vt. 356, 104 A. 337 (1918).
- 4 [§ 33.](#)

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

1. Necessity of Intent

§ 118. Question of law or fact

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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The intent with which a false representation was made by words, or conduct such as acts performed in concealing the existence of facts is ordinarily a question of fact¹ to be decided in view of the circumstances connected with, or immediately preceding or following, the transaction involved.² The question whether there was an intent to deceive the party who complains that he or she was defrauded by a false representation is one of fact.³ For illustration, it may be observed that whether or not a misrepresentation as to the ownership of certain property was made with fraudulent intent or was due to an honest mistake is a question for the jury to determine.⁴ The jury is to determine what the person making an ambiguous representation intended the person to whom it was made to understand by it, where its truth or falsity depends on the interpretation given it.⁵

Once the existence of a fraudulent intent has been determined, it rests with the court to declare its legal effect.⁶

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Footnotes

- 1 [Trice v. Commercial Union Assur. Co.](#), 334 F.2d 673 (6th Cir. 1964); [Halsey v. Minnesota-South Carolina Land & Timber Co.](#), 174 S.C. 97, 177 S.E. 29, 100 A.L.R. 1 (1934).
- 2 [Erskine v. Chevrolet Motors Co.](#), 185 N.C. 479, 117 S.E. 706, 32 A.L.R. 196 (1923).
- 3 [Rodgers v. Boise Ass'n of Credit Men](#), 33 Idaho 513, 196 P. 213, 23 A.L.R. 195 (1921).
- 4 [Feak v. Marion Steam Shovel Co.](#), 84 F.2d 670, 107 A.L.R. 583 (C.C.A. 9th Cir. 1936); [Feldmesser v. Lemberger](#), 101 N.J.L. 184, 127 A. 815, 41 A.L.R. 1153 (N.J. Ct. Err. & App. 1925).
- 5 [Downey v. Finucane](#), 205 N.Y. 251, 98 N.E. 391 (1912).

6

[Bergman v. Jones, 10 N.D. 520, 88 N.W. 284 \(1901\).](#)

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

2. Knowledge of Falsity

§ 119. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 207](#) (Instructions to jury—Elements of fraud—General form)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 224](#) (Instruction to jury—Liability for making representations with no apparent ground for believing representations are true)

Under the rule prevailing in most jurisdictions, in order to sustain a charge of fraud in the making of a false representation, it must appear either that the party making it knew that it was false,¹ or else that it was made under such circumstances as to raise a presumption of knowledge² although it may also be sufficient if, for example, it was made recklessly and willfully without regard to its consequences, and with an intent to mislead and deceive the plaintiff.³

Caution:

The Restatement Second, Torts takes the position that a misrepresentation is fraudulent if the maker: (1) knows or believes that the matter is not as he or she represents it to be; (2) does not have the confidence in the accuracy of his or her representation that

the maker states or implies; or (3) knows that he or she does not have the basis for his or her representation that the maker states or implies.⁴

Questions of fact are usually presented by issues concerning whether the defendant had knowledge of the truth or falsity of a representation,⁵ and such questions warrant submission to the jury.⁶

While the law raises no presumption of knowledge from the mere fact of falsity,⁷ there are cases in which false representations may constitute fraud even though the party making them did not actually know that they were false.⁸

It has been held that in order be fraudulent, a statement must be known to be false when it is communicated to another.⁹ However, even where knowledge of the falsity of the representations is necessary to constitute fraud, there is authority that the party making the representations need not have actually known them to be false at the time when they were made.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

In order to establish a claim for constructive fraud under Arkansas law, a plaintiff must show that defendant knows the misrepresentations to be false, or not knowing, asserts them to be true; plaintiff need not show moral guilt, purpose or intent of the defendant. [Ramthun v. Bryan Career College-Inc.](#), 93 F. Supp. 3d 1011 (W.D. Ark. 2015).

Law firm that purchased attorney's law firm before he died failed to establish fraudulent inducement and fraudulent concealment claims against attorney's widow, absent showing that she had knowledge that the alleged misrepresentations and omissions attributed to her and attorney were false and that she intended to induce law firm's reliance. [Hogan Willig, PLLC v. Kahn](#), 145 A.D.3d 1619, 44 N.Y.S.3d 321 (4th Dep't 2016).

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Footnotes

- 1 [OCM Principal Opportunities Fund v. CIBC World Markets Corp.](#), 157 Cal. App. 4th 835, 68 Cal. Rptr. 3d 828 (2d Dist. 2007), as modified, (Dec. 26, 2007); [Holmes v. Grubman](#), 286 Ga. 636, 691 S.E.2d 196 (2010); [Van Sickle Const. Co. v. Wachovia Commercial Mortg., Inc.](#), 783 N.W.2d 684 (Iowa 2010); [Wilkinson v. Shoney's, Inc.](#), 269 Kan. 194, 4 P.3d 1149 (2000); [Cumis Ins. Society, Inc. v. BJ's Wholesale Club, Inc.](#), 455 Mass. 458, 918 N.E.2d 36 (2009); [Tessier v. Rockefeller](#), 162 N.H. 324, 33 A.3d 1118 (2011).
A defendant cannot be liable in fraud for misrepresenting a fact that it has no knowledge is false. [RD & J Properties v. Lauralea-Dilton Enterprises, LLC](#), 165 N.C. App. 737, 600 S.E.2d 492 (2004).
A claim that an Internet marketing company violated Washington's Commercial Electronic Mail Act by sending unsolicited spam, which either misrepresented the point of origin or contained false or misleading information on the subject line, did not "sound in fraud" so as to trigger heightened pleading requirements for fraud, where the Act did not require that the sender "know" that the information in the subject line or

transmission path of the email was "false or misleading." *Gordon v. Impulse Marketing Group, Inc.*, 375 F. Supp. 2d 1040, 10 A.L.R.6th 681 (E.D. Wash. 2005).

Smith v. De Metre, 119 Vt. 73, 118 A.2d 346, 58 A.L.R.2d 1 (1955).

Brodeur v. American Home Assur. Co., 169 P.3d 139 (Colo. 2007).

Recklessness, generally, see § 122.

Restatement Second, Torts § 526.

Iasigi v. Brown, 58 U.S. 183, 17 How. 183, 15 L. Ed. 208, 1854 WL 7486 (1854); *Worcester Felt Pad Corp. v. Tucson Airport Authority*, 233 F.2d 44, 59 A.L.R.2d 1121 (9th Cir. 1956).

Equitable Life Ins. Co. of Iowa v. Halsey, Stuart & Co., 312 U.S. 410, 312 U.S. 668, 61 S. Ct. 623, 85 L. Ed. 920 (1941).

Smith v. De Metre, 119 Vt. 73, 118 A.2d 346, 58 A.L.R.2d 1 (1955).

Bobby Jones Garden Apartments, Inc. v. Suleski, 391 F.2d 172 (5th Cir. 1968); *Kroninger v. Anast*, 367 Mich. 478, 116 N.W.2d 863 (1962).

As to where there is a duty to know the truth, see § 121.

As to where statements are made recklessly, see § 122.

Owens-Corning Fiberglas Corp. v. Mayor and City Council of Baltimore City, 108 Md. App. 1, 670 A.2d 986 (1996).

Donnell v. C.R. Disharoon Co., 32 F.2d 151 (C.C.A. 4th Cir. 1929); *Schaffner v. National Supply Co.*, 80 W. Va. 111, 92 S.E. 580 (1917).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

2. Knowledge of Falsity

§ 120. Belief in truth of representation

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

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In some jurisdictions, the existence of an honest belief that a representation is true is a good defense to an action for deceit,¹ at least where the representations are made for an honest purpose,² and where there is no duty on the part of the person sought to be charged to know the truth.³ The rule is peculiarly applicable to the expression of an honest opinion, estimate, or judgment⁴ regardless of the question of its reasonableness.⁵

Caution:

An honest belief in the truth of a representation does not preclude an action for negligent misrepresentation.⁶

In some states, the assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true,⁷ or which the person has good reason to know is false,⁸ constitutes fraud, especially where a statement is made unqualifiedly or as of the personal knowledge of the speaker.⁹ On the other hand, in some jurisdictions, an action of deceit will not lie against one who makes a false representation which the speaker honestly believes to be true merely because the speaker has no reasonable

grounds for such belief or because the speaker relies on information which a wiser person might not credit.¹⁰ However, it has also been said that although the means of knowledge are a very different thing from knowledge, if a person who makes a false statement shuts his or her eyes to the facts or purposely abstains from inquiring into them, the person has no honest belief in their truth and is just as guilty of fraud as if he or she knowingly states that which is false.¹¹

Observation:

Generally, making a misrepresentation without reasonable ground for believing it to be true is an element of the separate tort of negligent misrepresentation.¹²

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Footnotes

- 1 South Branch Lumber Co. v. Ott, 142 U.S. 622, 12 S. Ct. 318, 35 L. Ed. 1136 (1892); Pickrell & Craig Co. v. Bollinger-Babbage Co., 204 Ky. 314, 264 S.W. 737 (1924); Rothermel v. Phillips, 292 Pa. 371, 141 A. 241, 61 A.L.R. 489 (1928).
An unintelligent but honest defendant does not satisfy the test of scienter for purposes of the tort of false representation. *Palmacci v. Umpierrez*, 121 F.3d 781 (1st Cir. 1997).
- 2 Pickrell & Craig Co. v. Bollinger-Babbage Co., 204 Ky. 314, 264 S.W. 737 (1924).
- 3 Pickrell & Craig Co. v. Bollinger-Babbage Co., 204 Ky. 314, 264 S.W. 737 (1924).
As to the effect of a duty to know the truth, see § 121.
- 4 Haigh v. White Way Laundry Co., 164 Iowa 143, 145 N.W. 473 (1914); Pickrell & Craig Co. v. Bollinger-Babbage Co., 204 Ky. 314, 264 S.W. 737 (1924).
- 5 Pickrell & Craig Co. v. Bollinger-Babbage Co., 204 Ky. 314, 264 S.W. 737 (1924).
- 6 § 128.
- 7 Brookings Mun. Utilities, Inc. v. Amoco Chemical Co., 103 F. Supp. 2d 1169, 42 U.C.C. Rep. Serv. 2d 470 (D.S.D. 2000) (applying South Dakota law); B.L.M. v. Sabo & Deitsch, 55 Cal. App. 4th 823, 64 Cal. Rptr. 2d 335 (4th Dist. 1997).
- 8 Hanson v. Johnson, 143 Or. 532, 23 P.2d 333 (1933).
- 9 Schlechter v. Felton, 134 Minn. 143, 158 N.W. 813 (1916).
As to statements made as of personal knowledge, unqualifiedly and recklessly, see §§ 122, 122.
- 10 Boddy v. Henry, 113 Iowa 462, 85 N.W. 771 (1901).
- 11 State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416, 120 A.L.R. 1250 (1938).
- 12 § 128.

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37 Am. Jur. 2d Fraud and Deceit § 121

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

2. Knowledge of Falsity

§ 121. Duty to know facts; innocent misrepresentations

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) 13(2)

It is very generally held that scienter, as a basis for a charge of fraud or deceit, may be proved by showing that the special situation or means of knowledge of the person making the representations are such as to make it the person's duty to know whether they are true or false.¹ Insofar as the element of knowledge is concerned, false representations may be ground for relief where the person making them ought to know,² or it is the person's duty to know,³ or the person has the means of knowing⁴ the truth. The rule applies even though the party making the statements does not know that they are false.⁵

Under some authority, an innocent misrepresentation is as much a legal fraud as an intended misrepresentation and the good faith of a party in making what proves to be a material misrepresentation is immaterial as to the question whether there was an actionable fraud if the other party acted on the misrepresentation to his or her detriment.⁶

In at least one jurisdiction, there is a separate tort of innocent misrepresentation, which, in contrast to the tort of negligent misrepresentation,⁷ is predicated on principles of warranty.⁸

The doctrine of innocent misrepresentation, in connection with obtaining a contract, recognizes that, if there was in fact a misrepresentation, although made innocently, and its deceptive influence was effective, the consequences to the plaintiff being as serious as though it had proceeded from a vicious purpose, he or she would have a right of action for the damages caused thereby either at law or in equity.⁹ While it is unnecessary to prove that the person making the representation had knowledge that the statements were false, for a claim of innocent misrepresentation, it is necessary to show privity of contract.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Even assuming that employee was in a fiduciary relationship with employer and employer's parent company, there was no evidence that employee knew or should have known that he possessed special knowledge of information relating to the details of transactions between the minority-owned business enterprise (MBE) that employee founded, his employer, and employer's parent company, or that employer and employer's parent company were misled by statements regarding the creation of the MBE, thus precluding employer's and parent company's fraud and misrepresentation claims against employee under Minnesota law. [Reisdorf v. i3, LLC, 129 F. Supp. 3d 751 \(D. Minn. 2015\)](#).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Hillock v. Idaho Title & Trust Co., 22 Idaho 440, 126 P. 612 \(1912\); Davis v. Central Land Co., 162 Iowa 269, 143 N.W. 1073 \(1913\).](#)
- 2 [Lehigh Zinc & Iron Co. v. Bamford, 150 U.S. 665, 14 S. Ct. 219, 37 L. Ed. 1215 \(1893\); Johnnycake Mountain Associates v. Ochs, 104 Conn. App. 194, 932 A.2d 472 \(2007\).](#)
- 3 [Wolford v. Children's Home Society of West Virginia, 17 F. Supp. 2d 577 \(S.D. W. Va. 1998\) \(applying West Virginia law\); Johnnycake Mountain Associates v. Ochs, 104 Conn. App. 194, 932 A.2d 472 \(2007\); Cordial v. Ernst & Young, 199 W. Va. 119, 483 S.E.2d 248 \(1996\).](#)
- 4 [Johnnycake Mountain Associates v. Ochs, 104 Conn. App. 194, 932 A.2d 472 \(2007\);](#)
Under West Virginia law, plaintiff does not need to prove that the defendant actually knew the representations were false if the defendant was in a position to know, and had a duty to know, whether the representations were true or false. [Wolford v. Children's Home Society of West Virginia, 17 F. Supp. 2d 577 \(S.D. W. Va. 1998\)](#).
- 5 [Richard v. A. Waldman & Sons, Inc., 155 Conn. 343, 232 A.2d 307 \(1967\); Clark v. Haggard, 141 Conn. 668, 109 A.2d 358, 54 A.L.R.2d 655 \(1954\).](#)
- 6 [Billy Barnes Enterprises, Inc. v. Williams, 982 So. 2d 494 \(Ala. 2007\).](#)
- 7 [§ 128.](#)
- 8 [Kramer v. Petisi, 285 Conn. 674, 940 A.2d 800 \(2008\).](#)
- 9 [Titan Ins. Co. v. Hyten, 491 Mich. 547, 817 N.W.2d 562 \(2012\).](#)
- 10 [Unibar Maintenance Services, Inc. v. Saigh, 283 Mich. App. 609, 769 N.W.2d 911 \(2009\).](#)

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37 Am. Jur. 2d Fraud and Deceit § 122

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

2. Knowledge of Falsity

§ 122. Reckless disregard of falsity

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  13(3)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 59](#) (Complaint, petition, or declaration—Allegation—Defendant's representations made in reckless disregard of truth)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 70](#) (Answer—Defense—Statements nonactionable opinions)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 224](#) (Instruction to jury—Liability for making representations with no apparent ground for believing representations are true)

A representation recklessly made, without knowing whether or not it is true, cannot be a statement honestly believed but, on the contrary, is regarded as a false statement knowingly made.¹ Thus, the scienter, or intent to deceive, requirement, for purposes of a fraud claim, can be satisfied by a showing of recklessness.² According to various authorities, a fraudulent representation may include a statement which—

— is made recklessly³ and for the purpose of inducing action upon it.⁴

— is recklessly made with the intent of deceiving the opposite party.⁵

— is made in reckless disregard of its truth or falsity.⁶

— is made recklessly without any knowledge of its truth.⁷

— is made in conscious indifference to its truth.⁸

— is a false or misleading statement and made recklessly and willfully without regard to its consequences, and with an intent to mislead and deceive the plaintiff.⁹

Some states require that a representation made recklessly must be a positive assertion in order to be actionable.¹⁰

The rule that one who makes a statement as if based on personal knowledge or makes such a positive and unqualified statement as implies knowledge on the speaker's part, when in fact the speaker has no knowledge on the subject, is guilty of fraud if the statement proves to be false, is generally held to apply only where the assertion is in respect of a matter that is definitely ascertainable, as distinguished from a matter of opinion, estimate, or judgment.¹¹

Observation:

The difference between the torts of "negligent misrepresentation" and "fraudulent misrepresentation" is that the latter requires proof that the defendant knew the statement was untrue or was reckless as to whether the statement was true or false while the former merely requires proof that the defendant failed to exercise reasonable care or competence to obtain or communicate true information.¹²

Misrepresentations made recklessly or innocently will not sustain an action for promissory fraud.¹³

CUMULATIVE SUPPLEMENT

Cases:

Scienter, as element of fraud claim under Georgia law, may be shown by a reckless representation. [Smith-Tyler v. Bank of America, N.A.](#), 992 F. Supp. 2d 1277 (N.D. Ga. 2014).

Under Texas law, Chapter 11 debtor, a limited liability company (LLC) in the business of selling fractional interests in Texas oil and gas wells, its sole member, and others knew that representation that they would keep no more than 4% of investor funds as management fee was false or, at a minimum, representation was made recklessly, as required to support investors' common law fraud claims; cash balance e-mail received by member showed accounts receivable on certain wells "Less: 25% Fees." [In re Primera Energy, LLC](#), 579 B.R. 75 (Bankr. W.D. Tex. 2017).

[END OF SUPPLEMENT]

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Footnotes

- 1 [Otis & Co. v. Grimes](#), 97 Colo. 219, 48 P.2d 788 (1935); [Davis v. Central Land Co.](#), 162 Iowa 269, 143 N.W. 1073 (1913).
- 2 [Lord v. Souder](#), 748 A.2d 393 (Del. 2000).
As to the requirement of an intent to deceive, see §§ 109 to 118.
- 3 [Sturm v. Harb Development, LLC](#), 298 Conn. 124, 2 A.3d 859 (2010); [Krahmer v. Christie's Inc.](#), 911 A.2d 399 (Del. Ch. 2006).
- 4 [Sturm v. Harb Development, LLC](#), 298 Conn. 124, 2 A.3d 859 (2010).
- 5 [Perimeter Realty v. GAPI, Inc.](#), 243 Ga. App. 584, 533 S.E.2d 136 (2000).
- 6 [Schooley v. Orkin Extermination, Co., Inc.](#), 502 F.3d 759 (8th Cir. 2007) (applying Iowa law); [Sun Nurseries, Inc. v. Lake Erma, LLC](#), 730 S.E.2d 556 (Ga. Ct. App. 2012); [Van Sickle Const. Co. v. Wachovia Commercial Mortg., Inc.](#), 783 N.W.2d 684 (Iowa 2010); [Renaissance Leasing, LLC v. Vermeer Mfg. Co.](#), 322 S.W.3d 112 (Mo. 2010).
- 7 [PCR Contractors, Inc. v. Danial](#), 354 S.W.3d 610 (Ky. Ct. App. 2011).
- 8 [In re Stafford's in the Field, Inc.](#), 192 B.R. 29 (Bankr. D. N.H. 1996) (applying New Hampshire law).
- 9 [Brodeur v. American Home Assur. Co.](#), 169 P.3d 139 (Colo. 2007).
- 10 [Ausley v. Bishop](#), 133 N.C. App. 210, 515 S.E.2d 72 (1999); [Livingston Livestock Exchange, Inc. v. Hull State Bank](#), 14 S.W.3d 849 (Tex. App. Beaumont 2000).
- 11 [Damon v. Sun Co., Inc.](#), 87 F.3d 1467 (1st Cir. 1996) (applying Massachusetts law; opinions cannot be basis of fraud claim); [Coons v. Bank of Commerce](#), 233 Ky. 457, 26 S.W.2d 15 (1930).
- 12 [Wilkinson v. Shoney's, Inc.](#), 269 Kan. 194, 4 P.3d 1149 (2000).
As to negligent misrepresentations, see §§ 128 to 130.
- 13 [Southland Bank v. A & A Drywall Supply Co., Inc.](#), 21 So. 3d 1196 (Ala. 2008).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

2. Knowledge of Falsity

§ 123. Rules dispensing with knowledge of falsity; statutes

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West's Key Number Digest, [Fraud](#) 13(2)

In some states, a maker's knowledge of the falsity of a material misrepresentation of fact is not a necessary element of fraud.¹ In some jurisdictions, in actions for damages for false representations, it is not necessary to allege or prove scienter,² or knowledge of the falsity of a statement,³ and it is sufficient if the representations were false in fact, and the defendant may be liable for damages because of them even though the defendant did not know that they were untrue.⁴ In one jurisdiction, a party making a misrepresentation need not know that a statement is false in order to be liable for fraud if the fact represented is susceptible of actual knowledge.⁵ Likewise, in another jurisdiction, a plaintiff does not need to prove that the defendant actually knew the representations were false if the defendant was in a position to know, and had a duty to know, whether the representations were true or false.⁶ Under the law of strict responsibility misrepresentation, whether a defendant knew or did not know the represented facts is immaterial.⁷ When liability for strict responsibility misrepresentation is imposed, it is not due to the defendant's knowledge or negligence, but rather due to the public policy that when a loss arises because an innocent defendant misled an innocent plaintiff, the loss should be borne by the party which made the misrepresentation in cases where public opinion seems to call for such a result.⁸

By statute in some states, to be actionable, a representation need not be made with knowledge of actual falsity but need only be an assertion, as a fact, of that which is not true by one who has no reasonable ground for believing it to be true.⁹ It is provided, for instance, that a misrepresentation of a material fact made by mistake and innocently and acted on by the opposite party, constitutes legal fraud.¹⁰

Footnotes

- 1 [Bros Inc. v. W. E. Grace Mfg. Co.](#), 227 F. Supp. 759 (N.D. Tex. 1964), judgment rev'd on other grounds, 351 F.2d 208, 9 Fed. R. Serv. 2d 60B.29, Case 5 (5th Cir. 1965).
- 2 [Ashby v. Peters](#), 128 Neb. 338, 258 N.W. 639, 99 A.L.R. 843 (1935); [Paul v. Cameron](#), 127 Neb. 510, 256 N.W. 11 (1934).
- 3 [Cordial v. Ernst & Young](#), 199 W. Va. 119, 483 S.E.2d 248 (1996).
- 4 [Irwin v. Carlton](#), 369 Mich. 92, 119 N.W.2d 617 (1963).
- 5 [Damon v. Sun Co., Inc.](#), 87 F.3d 1467 (1st Cir. 1996) (applying Massachusetts law).
- 6 [Wolford v. Children's Home Society of West Virginia](#), 17 F. Supp. 2d 577 (S.D. W. Va. 1998).
- 7 [Lewis v. Paul Revere Life Ins. Co.](#), 80 F. Supp. 2d 978 (E.D. Wis. 2000).
- 8 [Lewis v. Paul Revere Life Ins. Co.](#), 80 F. Supp. 2d 978 (E.D. Wis. 2000).
- 9 [Gagne v. Bertran](#), 43 Cal. 2d 481, 275 P.2d 15 (1954).
- 10 [Lawson v. Harris Culinary Enterprises, LLC](#), 83 So. 3d 483 (Ala. 2011).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

a. Representations; Concealment

§ 124. Representations by disinterested persons

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A.L.R. Library

[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

The rule that one is not guilty of fraud that will sustain an action of deceit if the person does not know that the person's statements are false, and honestly intends to tell the truth,¹ is particularly applicable to representations made by third persons who have no interest in the transaction to which the representations relate.² However, even though a disinterested third person is not bound to answer inquiries made of him or her, if the person does so or volunteers information, the person is bound not to make a fraudulent representation, and the person must not intentionally mislead.³ One who is disinterested in a transaction induced by his or her misrepresentations becomes liable in damages where the representations were made with knowledge of their falsity and with the intent to deceive the person who acted upon them.⁴ That false information is given gratuitously as a business courtesy does not preclude liability.⁵

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Footnotes

- 1 §§ 119 to 123.
- 2 Lord v. Goddard, 54 U.S. 198, 13 How. 198, 14 L. Ed. 111, 1851 WL 6691 (1851); Nash v. Minnesota Title Insurance & Trust Co., 163 Mass. 574, 40 N.E. 1039 (1895).
- 3 Nash v. Minnesota Title Insurance & Trust Co., 163 Mass. 574, 40 N.E. 1039 (1895); Tischer v. Bardin, 155 Minn. 361, 194 N.W. 3 (1923).
- 4 Nash v. Minnesota Title Insurance & Trust Co., 163 Mass. 574, 40 N.E. 1039 (1895).
- 5 First Trust & Sav. Bank of Zanesville, Ohio v. Fidelity-Philadelphia Trust Co., 214 F.2d 320, 50 A.L.R.2d 1218 (3d Cir. 1954).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

a. Representations; Concealment

§ 125. Representations as to financial responsibility, credit, and solvency

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  13

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 124](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to own financial standing—General form)

In an action based upon a financial statement, where the gist of the complaint is fraud, a fraudulent intent must be proved, but this does not necessarily mean the showing of an actual intent to deceive and may be established by reasonable inferences from proved facts.¹ Moreover, in accordance with the generally followed rule that equity will grant relief or rescission for misstatements made innocently or without a fraudulent intent, at least where the contract is still executory,² it is held that a seller may rescind a sale induced by the buyer's misrepresentation as to the buyer's solvency or financial position even though such misrepresentation is made in good faith and without fraudulent intent.³ It is not necessary in the case of actual misrepresentations as to the solvency of the buyer, to prove that the buyer had no intention to pay,⁴ and where goods have been obtained on credit by means of representations known to be false, it is no defense that the purchaser expected to be able to pay for them and had no intention of subjecting the seller to a loss.⁵ There is authority, however, that to vitiate the contract, misrepresentations as to the solvency of the buyer must be knowingly or willfully false.⁶

Footnotes

- 1 [Hills Sav. Bank v. Cress](#), 205 Iowa 306, 218 N.W. 74 (1928); [Howard v. Barnstable County Nat. Bank of Hyannis](#), 291 Mass. 131, 197 N.E. 40 (1935).
Assuming that a corporation's inventories were overvalued in two financial statements, the statements did not violate a Puerto Rico statute proscribing the publication or disbursement of false information regarding the condition or business of a corporation, absent proof that the falsity was intended or that the creditor relied on the incorrect inventory value in extending credit. [Wadsworth, Inc. v. Schwarz-Nin](#), 951 F. Supp. 314 (D.P.R. 1996).
- 2 §§ 134, 135.
- 3 [Turner v. Ward](#), 154 U.S. 618, 14 S. Ct. 1179, 23 L. Ed. 391 (1876); [Mooney v. Davis](#), 75 Mich. 188, 42 N.W. 802 (1889).
As to the necessity of fraudulent intent and scienter for fraud in sales, generally, see § 131.
- 4 [Reid v. Cowduroy](#), 79 Iowa 169, 44 N.W. 351 (1890).
As to promises made with an intention not to perform, generally, see §§ 94 to 100.
- 5 [Atlas Shoe Co. v. Bechard](#), 102 Me. 197, 66 A. 390 (1906).
- 6 [Jaffray v. Moss](#), 41 La. Ann. 548, 6 So. 520 (1889).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

a. Representations; Concealment

§ 126. Representations as to financial responsibility, credit, and solvency—Indirect representations

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 36](#) (Complaint, petition, or declaration—For damages—Intentional misrepresentation of true financial condition of corporation to which plaintiff had extended credit)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 125](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to own financial standing—Made through merchants' credit association)

The principle of liability for indirect representations has been applied where a person makes false representations to a commercial agency as to the person's financial responsibility, for the purpose of obtaining credit from a subscriber to the agency, who relies upon this information, and the person making such representations is liable in the same manner as if they had been made directly to the party injured.¹ This rule applies where one makes false representations to a commercial agency as to the financial condition of a firm or corporation of which the person is a member or stockholder.²

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Footnotes

- 1 Hiller v. Ellis, 72 Miss. 701, 18 So. 95 (1895); Tindle v. Birkett, 171 N.Y. 520, 64 N.E. 210 (1902); Gainesville Nat. Bank v. Bamberger, 77 Tex. 48, 13 S.W. 959 (1890).
As to the liability of the commercial or credit-reporting agency, see [Am. Jur. 2d, Collection and Credit Agencies §§ 39, 40](#).
- 2 Forbes v. Auerbach, 56 So. 2d 895, 32 A.L.R.2d 176 (Fla. 1952); Mulkey v. Morris, 1957 OK 168, 313 P.2d 494 (Okla. 1957) (partner).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

a. Representations; Concealment

§ 127. Representations as to financial responsibility, credit, and solvency—Representations regarding third person

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon,](#)
32 A.L.R.2d 184

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 126 to 128](#) (Complaint, petition, or declaration—For damages—Misrepresentations as to solvency of third person)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 131](#) (Complaint in federal court—For damages—False representations as to solvency of third person—Inducing sale)

In order to hold a disinterested person liable in damages in tort for false representations as to the credit and solvency of a third person to whom credit is extended, all the elements of fraud must be established, and it is frequently stated that an intent to deceive and scienter must be proved.¹ The courts agree, on the other hand, that if a statement regarding a third person is known to be false at the time it is made and is made with intent to defraud, there will be liability for the injury caused by it.²

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Footnotes

- 1 Yates Center Nat. Bank v. Allen, 92 Kan. 481, 141 P. 553 (1914); Knight v. Rawlings, 205 Mo. 412, 104 S.W. 38 (1907); Lawson v. Vernon, 38 Wash. 422, 80 P. 559 (1905).
As to liability of a commercial or credit-reporting agency, see Am. Jur. 2d, Collection and Credit Agencies §§ 39, 40.
- 2 Lord v. Goddard, 54 U.S. 198, 13 How. 198, 14 L. Ed. 111, 1851 WL 6691 (1851); State Street Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416, 120 A.L.R. 1250 (1938); Lillian Knitting Mills Co. v. Earle, 237 N.C. 97, 74 S.E.2d 351 (1953); Pacific Fruit & Produce Co. v. Modern Food Stores, 158 Wash. 212, 290 P. 859 (1930).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

b. Negligent Misrepresentation

§ 128. Generally

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Many states have recognized a cause of action in tort for negligent misrepresentation.¹ Moreover, in some jurisdictions, a cause of action for negligence is authorized by statute.² Although the requirements vary from state to state, to establish the elements of negligent misrepresentation, a plaintiff must generally show that—

— the defendant had a duty to exercise reasonable care in the giving of information.³

— the defendant supplied false information,⁴ sometimes referred to as making a misrepresentation of a past or existing material fact.⁵

- the defendant made the misrepresentation negligently,⁶ without exercising reasonable care in obtaining or relating the information,⁷ or without reasonable ground for believing it to be true,⁸ although it is not necessary that defendant actually possessed knowledge of the statement's falsity.⁹
 - the plaintiff reasonably or justifiably relied upon the information given.¹⁰
 - the plaintiff suffered damages proximately caused by the defendant's negligence¹¹ or from such reliance.¹²
- Additional elements sometimes identified are—
- that there was privity between the parties, or a special relationship of trust or confidence creating a duty for one party to impart correct information to another.¹³
 - that the representation was made by a defendant in the course of his or her business,¹⁴ or in a transaction in which he or she had a pecuniary interest.¹⁵
 - that the defendant intended that his or her statement would be acted upon by the plaintiff,¹⁶ or that the false information was supplied for the guidance of others in their business.¹⁷
 - that the defendant knew or should have known the representation would induce reliance on the part of the plaintiff.¹⁸

Observation:

"Negligent misrepresentation" is a lesser included claim of fraudulent misrepresentation, and it differs from fraudulent misrepresentation only in that while the latter requires knowledge that the pertinent statement was false, the former merely requires that the person who made the statement failed to exercise reasonable care or competence to obtain or communicate true information.¹⁹

Caution:

An action for negligent misrepresentation may be precluded by the provisions of a purchase contract covering the subject matter of the claim.²⁰

CUMULATIVE SUPPLEMENT

Cases:

Lack of special relationship between parties distinct from and independent of the contract meant that plaintiffs failed to state negligent misrepresentation claim against defendants. [Rosenblum v. Island Custom Stairs, Inc.](#), 130 A.D.3d 803, 2015 WL 4254063 (2d Dep't 2015).

Under California law, the elements of a negligent misrepresentation cause of action are the same as those for intentional fraud, except respect to the requisite state of mind. [Villalpando v. Transguard Insurance Company of America](#), 17 F. Supp. 3d 969 (N.D. Cal. 2014).

Providers of in-flight entertainment on airlines did not adequately allege that record companies and music composers had no reasonable grounds for believing their representations to be true, precluding providers' California-law claim for negligent misrepresentation, where providers offered only bare allegation that defendants had no reasonable grounds for believing that representations concerning their intent to perform on purported promise to permit providers' continued reproduction of copyrighted sound records were true when made. [UMG Recordings, Inc. v. Global Eagle Entertainment, Inc.](#), 117 F. Supp. 3d 1092 (C.D. Cal. 2015).

As part of the duty-risk analysis applicable to negligent misrepresentation cases, the plaintiff must show that the risk of harm was within the scope of protection afforded by the duty breached. [Reel Pipe, LLC v. USA Comserv, Inc.](#), 427 F. Supp. 3d 786 (E.D. La. 2019).

To prevail on a claim for negligent misrepresentation under Massachusetts law, plaintiff does not have to prove an intent to deceive and need not prove that defendant knew his statements to be false. [Samia Companies LLC v. MRI Software LLC](#), 53 F. Supp. 3d 385 (D. Mass. 2014).

Under New York law, claim for negligent misrepresentation requires a fiduciary duty or special relationship that involves a closer degree of trust between the parties than that of an ordinary buyer and seller in order to find plaintiff's reliance on defendant's statements justified. [Prime Mover Capital Partners L.P. v. Elixir Gaming Technologies, Inc.](#), 898 F. Supp. 2d 673 (S.D. N.Y. 2012).

Plaintiff must allege the following elements in order to state a claim for negligent misrepresentation: (1) a misrepresentation of material fact in the course of the defendant's business, profession, or employment, or in any other transaction in which he has a pecuniary interest, (2) the defendant either knew of the misrepresentation, made the misrepresentation without knowledge of its truth or falsity, or should have known the representation was false, (3) the defendant intended to induce another to act on the misrepresentation, and (4) injury resulted to a party acting in justifiable reliance upon the misrepresentation. [In re Palm Beach Finance Partners, L.P.](#), 517 B.R. 310 (Bankr. S.D. Fla. 2013).

Negligent misrepresentation addresses negligence of knowledge of material fact and the transmittal of already known material facts. [Steichschulte v. Jennings](#), 298 P.3d 1083 (Kan. 2013).

In order to prove negligent misrepresentation, a plaintiff must show that there was a legal duty on the part of the defendant to supply correct information, there was a breach of that duty, and the breach caused plaintiff damage. [LSA—C.C. arts. 2315, 2316. Granger v. Christus Health Central Louisiana](#), 144 So. 3d 736 (La. 2013).

At the threshold, to establish a claim for either intentional or negligent misrepresentation, a plaintiff must show that the defendant supplied plaintiff with false information, and summary judgment is appropriate if plaintiff has not provided evidence of this essential element. [Land Baron Inv. v. Bonnie Springs Family LP](#), 356 P.3d 511, 131 Nev. Adv. Op. No. 69 (Nev. 2015).

It is not the nature of the communication that impacts the viability of a negligent misrepresentation claim, nor is it sufficient that a plaintiff detrimentally changes his or her position as a consequence of the false information; the necessary piece in this puzzle

is that the plaintiff actually received or was made aware of the false statements and directly relied on those false statements. Restatement (Second) of Torts § 552 (1977). *Glassford v. Dufresne & Associates, P.C.*, 2015 VT 77, 124 A.3d 822 (Vt. 2015).

[END OF SUPPLEMENT]

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Footnotes

- 1 *Retrofit Partners I, L.P. v. Lucas Industries, Inc.*, 201 F.3d 155 (2d Cir. 2000) (applying Connecticut law); *Ragland v. U.S. Bank Nat. Assn.*, 209 Cal. App. 4th 182, 147 Cal. Rptr. 3d 41 (4th Dist. 2012); *Cole v. New England Mut. Life Ins. Co.*, 49 Mass. App. Ct. 296, 729 N.E.2d 319 (2000); *Coverdell v. Countrywide Home Loans, Inc.*, 375 S.W.3d 874 (Mo. Ct. App. S.D. 2012).
As to negligent misrepresentations as to the credit or financial condition of another person, see § 127. The American Law Institute has indicated acceptance of the principles, at least in cases where a person negligently supplies information for the guidance of others. Restatement Second, Torts § 552.
- 2 *Hale v. George A. Hormel & Co.*, 48 Cal. App. 3d 73, 121 Cal. Rptr. 144 (4th Dist. 1975).
- 3 *Lavine v. American Airlines, Inc.*, 2011 WL 6003609 (Md. Ct. Spec. App. 2011); *Smith v. Woodwind Homes, Inc.*, 605 N.W.2d 418 (Minn. Ct. App. 2000); *Walker v. Town of Stoneville*, 712 S.E.2d 239 (N.C. Ct. App. 2011), review withdrawn, 717 S.E.2d 388 (N.C. 2011) and review withdrawn, 731 S.E.2d 834 (N.C. 2011); *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005).
As to special relationship creating such a duty, see § 129.
- 4 *Lavine v. American Airlines, Inc.*, 2011 WL 6003609 (Md. Ct. Spec. App. 2011); *Coverdell v. Countrywide Home Loans, Inc.*, 375 S.W.3d 874 (Mo. Ct. App. S.D. 2012); *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); *Key v. Pierce*, 8 S.W.3d 704 (Tex. App. Fort Worth 1999).
- 5 *Ragland v. U.S. Bank Nat. Assn.*, 209 Cal. App. 4th 182, 147 Cal. Rptr. 3d 41 (4th Dist. 2012).
An investor's allegations that a corporation's former executive officers gave him revenue projections that were "arbitrary and capricious," "made with fraudulent intent," and "false and flawed" were insufficient to show how the revenue projections amounted to an untrue statement of "past or present material fact," as required to state a claim for negligent misrepresentation. *Trooien v. Mansour*, 608 F.3d 1020 (8th Cir. 2010) (applying Minnesota law).
- 6 *Futch v. Lowndes County*, 297 Ga. App. 308, 676 S.E.2d 892 (2009); *Lavine v. American Airlines, Inc.*, 2011 WL 6003609 (Md. Ct. Spec. App. 2011).
- 7 *Smallwood v. NCsoft Corp.*, 730 F. Supp. 2d 1213 (D. Haw. 2010) (applying Hawai'i law); *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005) (due care); *Medical Educ. Assistance Corp. v. State ex rel. East Tennessee State University Quillen College of Medicine*, 19 S.W.3d 803 (Tenn. Ct. App. 1999); *Cunningham v. Tarski*, 365 S.W.3d 179 (Tex. App. Dallas 2012), review denied, (Sept. 21, 2012); *Snyder v. Lovercheck*, 992 P.2d 1079 (Wyo. 1999).
- 8 *Ragland v. U.S. Bank Nat. Assn.*, 209 Cal. App. 4th 182, 147 Cal. Rptr. 3d 41 (4th Dist. 2012); *Kurtzenacker v. Davis Surveying, Inc.*, 2012 MT 105, 365 Mont. 71, 278 P.3d 1002 (2012); *Ehresmann v. Muth*, 2008 SD 103, 757 N.W.2d 402 (S.D. 2008).
- 9 *Jones v. Koons Automotive, Inc.*, 752 F. Supp. 2d 670, 73 U.C.C. Rep. Serv. 2d 127 (D. Md. 2010), subsequent determination, 2011 WL 768832 (D. Md. 2011) (applying Maryland law).
- 10 *Ragland v. U.S. Bank Nat. Assn.*, 209 Cal. App. 4th 182, 147 Cal. Rptr. 3d 41 (4th Dist. 2012); *Futch v. Lowndes County*, 297 Ga. App. 308, 676 S.E.2d 892 (2009); *Lavine v. American Airlines, Inc.*, 2011 WL 6003609 (Md. Ct. Spec. App. 2011); *Coverdell v. Countrywide Home Loans, Inc.*, 375 S.W.3d 874 (Mo. Ct. App. S.D. 2012); *Walker v. Town of Stoneville*, 712 S.E.2d 239 (N.C. Ct. App. 2011), review withdrawn, 717 S.E.2d 388 (N.C. 2011) and review withdrawn, 731 S.E.2d 834 (N.C. 2011); *Armstrong v. Collins*, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); *Cunningham v. Tarski*, 365 S.W.3d 179 (Tex. App. Dallas 2012), review denied, (Sept. 21, 2012).
- 11 *Ragland v. U.S. Bank Nat. Assn.*, 209 Cal. App. 4th 182, 147 Cal. Rptr. 3d 41 (4th Dist. 2012); *Lavine v. American Airlines, Inc.*, 2011 WL 6003609 (Md. Ct. Spec. App. 2011); *Coverdell v. Countrywide Home*

Loans, Inc., 375 S.W.3d 874 (Mo. Ct. App. S.D. 2012); *Cunningham v. Tarski*, 365 S.W.3d 179 (Tex. App. Dallas 2012), review denied, (Sept. 21, 2012).

Futch v. Lowndes County, 297 Ga. App. 308, 676 S.E.2d 892 (2009).

§ 129.

Coverdell v. Countrywide Home Loans, Inc., 375 S.W.3d 874 (Mo. Ct. App. S.D. 2012); *Cunningham v. Tarski*, 365 S.W.3d 179 (Tex. App. Dallas 2012), review denied, (Sept. 21, 2012).

Armstrong v. Collins, 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005); *Cunningham v. Tarski*, 365 S.W.3d 179 (Tex. App. Dallas 2012), review denied, (Sept. 21, 2012).

Lavine v. American Airlines, Inc., 2011 WL 6003609 (Md. Ct. Spec. App. 2011).

Cunningham v. Tarski, 365 S.W.3d 179 (Tex. App. Dallas 2012), review denied, (Sept. 21, 2012).

§ 130.

Fleming Companies, Inc. v. GAB Business Services, Inc., 103 F. Supp. 2d 1271 (D. Kan. 2000).

Business Radio, Inc. v. Relm Wireless Corp., 373 F. Supp. 2d 1317 (M.D. Fla. 2005), *aff'd*, 209 Fed. Appx. 899 (11th Cir. 2006) (applying Florida law).

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37 Am. Jur. 2d Fraud and Deceit § 129

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Fraud and Deceit

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

b. Negligent Misrepresentation

§ 129. Privity or special relationship

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

While negligent misrepresentation claims frequently arise when the parties have a relationship,¹ under some authority, privity of contract between the parties is not an element of negligent misrepresentation,² and need not be proved by plaintiff.³ Under this view, a third party, although not in privity, has a claim for the alleged negligence of a professional who renders an opinion upon which the third person relies to its detriment.⁴

Other courts limit negligent misrepresentation claims to situations involving actual privity of contract between the parties,⁵ or at least a relationship so close as to approach that of privity.⁶ Liability may arise despite a lack of privity where the defendant assumes a duty to convey information accurately,⁷ or where there is intimacy of the resulting nexus and a bond so close as to approach that of privity.⁸ Under this view, a claim for negligent misrepresentation requires the plaintiff to demonstrate (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff;

(2) that the information was incorrect; and (3) reasonable reliance on the information.⁹ There is also authority that a plaintiff may recover against a professional who negligently makes representations or gives advice only if there is privity of contract or if the negligent professional had actual knowledge that the plaintiff would be affected by the representations made.¹⁰ Under a related approach, in determining whether a duty is owed where plaintiff alleges negligent misrepresentations in a professional's report and there is an absence of privity of contract or fiduciary relationship between plaintiff and the alleged tortfeasor, the courts consider: (1) whether the tortfeasor could expect that plaintiffs would receive and rely upon the information, (2) whether plaintiffs are members of the limited group for whose benefit and guidance the report was contracted and supplied, (3) whether the report was prepared in the context of a business transaction for which the alleged tortfeasor received compensation, and (4) whether extending tort liability would serve public policy.¹¹ It has been said in this regard that unlike a professional malpractice or negligence claim, liability for a negligent misrepresentation claim is not based on a breach of duty a professional owes a client or others in privity; rather, liability is based on the professional's manifest awareness of the nonclient's reliance and the professional's intention that the nonclient rely on the professional's representations.¹²

The Restatement Second, Torts provides that one who, in the course of his or her business, profession, or employment or in any other transaction in which he or she has a pecuniary interest, supplies false information for the guidance of others in their business transactions is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information if he or she fails to exercise reasonable care or competence in obtaining or communicating the information.¹³

Observation:

Negligent misrepresentation has no application in an employment relationship where representations are made to "sell" the company rather than to guide the employee with professional advice.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Under West Virginia law, a special duty or relationship must be proven to support a claim for reckless or negligent misrepresentation. [Tinsley v. OneWest Bank, FSB, 4 F. Supp. 3d 805 \(S.D. W. Va. 2014\)](#).

Determining whether a special relationship exists ordinarily requires a fact-intensive, case-by-case inquiry, for purposes of a negligent misrepresentation claim under New York law. [Schwartzco Enterprises LLC v. TMH Management, LLC, 60 F. Supp. 3d 331 \(E.D. N.Y. 2014\)](#).

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Footnotes

- 1 [Jeffries v. Pat A. Madison, Inc.](#), 269 S.W.3d 689 (Tex. App. Eastland 2008).
- 2 [White v. Bowman](#), 304 S.W.3d 141 (Mo. Ct. App. S.D. 2009); [Miller v. Big River Concrete, LLC](#), 14 S.W.3d 129 (Mo. Ct. App. E.D. 2000).
- 3 [Jeffries v. Pat A. Madison, Inc.](#), 269 S.W.3d 689 (Tex. App. Eastland 2008).
- 4 [Richey v. Philipp](#), 259 S.W.3d 1 (Mo. Ct. App. W.D. 2008).
- 5 [Anschutz Corp. v. Merrill Lynch & Co., Inc.](#), 690 F.3d 98 (2d Cir. 2012) (applying New York law); [Huntington Mortg. Co. v. Mortgage Power Financial Services, Inc.](#), 90 F. Supp. 2d 670 (D. Md. 2000), *aff'd*, 3 Fed. Appx. 126 (4th Cir. 2001).
- 6 [Anschutz Corp. v. Merrill Lynch & Co., Inc.](#), 690 F.3d 98 (2d Cir. 2012) (applying New York law).
Under Ohio law, a special relationship under which the defendant supplied information to the plaintiff for the latter's guidance in its business transaction, as required on a claim for negligent misrepresentation, occurs only in special circumstances; usually the defendant is a professional who is in the business of rendering opinions to others for their use in guiding their business, and the plaintiff is a member of a limited class. [Ford v. New Century Mortg. Corp.](#), 797 F. Supp. 2d 862 (N.D. Ohio 2011).
- 7 [Zampatori v. United Parcel Service](#), 125 Misc. 2d 405, 479 N.Y.S.2d 470 (Sup 1984).
- 8 [Tennessee Hospital Service Ass'n v. Strang](#), 49 Tenn. App. 263, 354 S.W.2d 488 (1961).
- 9 [Mandarin Trading Ltd. v. Wildenstein](#), 16 N.Y.3d 173, 919 N.Y.S.2d 465, 944 N.E.2d 1104 (2011).
In deciding whether liability for negligent misrepresentation can be imposed against an accountant by a nonprivity third party, the court asks whether the accountant was aware that the reports were to be used for a particular purpose, whether in furtherance of such purpose a known party was intended to rely and, finally, whether there was some linking conduct which evinced the accountant's understanding of that party's reliance. [Securities Investor Protection Corp. v. BDO Seidman, L.L.P.](#), 95 N.Y.2d 702, 723 N.Y.S.2d 750, 746 N.E.2d 1042 (2001).
An architect for a condominium building was not in the functional equivalent of privity with the architect of record for the design and construction of an apartment in the building, and thus, the apartment architect failed to state a negligent misrepresentation claim based on the functional equivalent of privity, even if the building architect failed to inform the apartment architect that its plans did not comply with building codes and other regulations, where there was no evidence that the building architect intended for the apartment architect to rely on it or that the building architect engaged in conduct evincing such understanding. [Beck v. Studio Kenji, Ltd.](#), 90 A.D.3d 462, 935 N.Y.S.2d 5 (1st Dep't 2011).
- 10 [Querrey & Harrow, Ltd. v. Transcontinental Ins. Co.](#), 861 N.E.2d 719 (Ind. Ct. App. 2007), *transfer granted*, *opinion vacated*, IN RAP 58(A), (Aug. 7, 2007) and *opinion adopted*, 885 N.E.2d 1235 (Ind. 2008).
- 11 [Audler v. CBC Innovis Inc.](#), 519 F.3d 239 (5th Cir. 2008).
- 12 [Ervin v. Mann Frankfort Stein & Lipp CPAs, L.L.P.](#), 234 S.W.3d 172 (Tex. App. San Antonio 2007).
- 13 [Restatement Second, Torts § 552\(1\)](#).
- 14 [Schoff v. Combined Ins. Co. of America](#), 604 N.W.2d 43 (Iowa 1999).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

b. Negligent Misrepresentation

§ 130. Inducement of reliance

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In some jurisdictions, in addition to the requirement that the plaintiff must justifiably rely on the defendant's representation, the plaintiff must show that the defendant knew or should have known the representation would induce reliance on the part of the plaintiff¹ or that the defendant made the representation with the intent to induce another's reliance on the fact misrepresented.² Where the very instrument that creates the required "relation of duty" to support a claim of negligent misrepresentation expressly provides that neither party is relying upon representations or statements not contained in the contract, there can be no cause of action based on negligent statements or promises allegedly made before such a contract is executed.³

CUMULATIVE SUPPLEMENT

Cases:

Defendant could not be held liable for negligent misrepresentation in connection with contract, where it had no special knowledge with respect to alleged misrepresented facts, which were all a matter of public record. [Chestnut Holdings of New York, Inc. v. LNR Partners, LLC](#), 106 A.D.3d 575, 965 N.Y.S.2d 470 (1st Dep't 2013).

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Footnotes

- 1 [F:A J Kikson v. Underwriters Laboratories, Inc.](#), 492 F.3d 794 (7th Cir. 2007) (applying Illinois law); [Lavine v. American Airlines, Inc.](#), 2011 WL 6003609 (Md. Ct. Spec. App. 2011).
- A claim for negligent misrepresentation may be made when the misrepresented facts induced the plaintiff to enter a contract or business transaction. [Armstrong v. Collins](#), 366 S.C. 204, 621 S.E.2d 368 (Ct. App. 2005).
- 2 [Kremen v. Cohen](#), 99 F. Supp. 2d 1168 (N.D. Cal. 2000), *aff'd* in part, *rev'd* in part and remanded on other grounds, 337 F.3d 1024 (9th Cir. 2003) (applying California law).
- 3 [Chase Manhattan Bank, N.A. v. Edwards](#), 87 A.D.2d 935, 450 N.Y.S.2d 76 (3d Dep't 1982), *order aff'd*, 59 N.Y.2d 817, 464 N.Y.S.2d 739, 451 N.E.2d 486 (1983).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

c. Transactions

§ 131. Sales

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West's Key Number Digest

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Trial Strategy

[Misrepresentation in Sale of Animal, 35 Am. Jur. Proof of Facts 2d 607](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 91 to 122](#) (Complaints, petitions, or declarations—Fraud in sales of personal property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 123 to 131](#) (Complaint—Fraud in securing sales of goods on credit)

The general rule in most jurisdictions is that representations by a seller or vendor as to the subject matter of a sale must be made with an intent to deceive in order to be fraudulent.¹ This is especially true if the seller in good faith believed his or her

representations to be true and did not make them recklessly or regardless of whether they were true.² Likewise, it is the general rule in many jurisdictions that it is necessary to show scienter or knowledge on a vendor's part of the falsity of a representation in order to sustain a charge of fraud against the vendor.³ On the other hand, according to the view taken in many cases, if a vendor, without any knowledge as to whether a statement is true or not, undertakes to make material representations as to the character of the subject matter of the sale, a charge of fraud may be based thereon, as in other cases, the vendor's undertaking as of the vendor's own knowledge to assert the truth of that which the vendor does not know to be true is a fraud on the party dealing with the vendor.⁴ A vendor may be charged with fraud upon the basis of statements made carelessly and recklessly.⁵ Thus, if a seller makes a representation of the existence of a fact, as if based on personal knowledge, recklessly and without regard to whether such fact exists, and without any reason for believing that it does exist, a charge of fraud may be based on its falsity even though in fact the seller did not know that it was false.⁶ This is especially true where the relief sought by the purchaser is that of rescission.⁷

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Footnotes

- 1 L. C. James Motor Co. v. Wetmore, 36 Ariz. 382, 286 P. 180 (1930); Towels v. Campbell, 204 Ky. 591, 264 S.W. 1107, 50 A.L.R. 175 (1924); Halsey v. Minnesota-South Carolina Land & Timber Co., 174 S.C. 97, 177 S.E. 29, 100 A.L.R. 1 (1934).
For representations as to financial status, credit, and solvency in sales with respect to intent to deceive and scienter, see §§ 125 to 127.
One who, in a sale, rental, or exchange transaction with another, makes a misrepresentation of a material fact for the purpose of inducing the other to act or to refrain from acting in reliance upon it, is subject to liability to the other for pecuniary loss caused to him or her by his or her justifiable reliance upon the misrepresentation even though it is not made fraudulently or negligently. *Restatement Second, Torts* § 552C(1).
- 2 Lewark v. Carter, 117 Ind. 206, 20 N.E. 119 (1889).
- 3 Towels v. Campbell, 204 Ky. 591, 264 S.W. 1107, 50 A.L.R. 175 (1924).
- 4 Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950); Halsey v. Minnesota-South Carolina Land & Timber Co., 174 S.C. 97, 177 S.E. 29, 100 A.L.R. 1 (1934).
- 5 Holland Furnace Co. v. Korth, 43 Wash. 2d 618, 262 P.2d 772, 41 A.L.R.2d 1166 (1953).
- 6 L. C. James Motor Co. v. Wetmore, 36 Ariz. 382, 286 P. 180 (1930).
- 7 Wilson v. Robinson, 21 N.M. 422, 155 P. 732 (1916); Jeffreys v. Weekly, 81 Or. 140, 158 P. 522 (1916).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

c. Transactions

§ 132. Sales—Of corporate securities

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West's Key Number Digest, [Fraud](#)  13(3)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 132 to 146](#) (Complaints, petitions, or declarations—Fraud in security transactions)

It is well settled that the purchaser's right to rescind a contract of subscription to,¹ or purchase of, corporate securities on the ground of fraud does not depend necessarily upon a showing of actual knowledge of the falsity thereof by the party making the misrepresentations.² On the other hand, representations in the form of opinion or promises concerning future returns on the stock can amount to actionable fraud if the plaintiff proves that the representations were known to be false by the salesperson making them when they were made, were made to deceive the purchaser and to induce him or her to purchase the stock, and were relied upon by the purchaser.³

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Footnotes

- 1 [Maine v. Midland Inv. Co.](#), 132 Iowa 272, 109 N.W. 801 (1906); [Haebler v. Crawford](#), 258 N.Y. 130, 179 N.E.
319 (1932), reargument denied, remittitur amended on other grounds, 258 N.Y. 607, 180 N.E. 353 (1932).
- 2 [King v. Shawver](#), 30 S.W.2d 930 (Tex. Civ. App. Fort Worth 1930) (suit to recover money paid for worthless
bonds); [Trust Co. of Norfolk v. Fletcher](#), 152 Va. 868, 148 S.E. 785, 73 A.L.R. 1111 (1929).
- 3 [Brooks v. Parr](#), 507 S.W.2d 818 (Tex. Civ. App. Amarillo 1974).
- As to securities fraud, see [Am. Jur. 2d, Securities Regulation—Federal §§ 277, 397 to 413, 1194 to 1200, 1386 to 1484](#); [Am. Jur. 2d, Securities Regulation—State §§ 160 to 164, 196](#).

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George Blum, J.D., John Bourdeau, J.D., Romualdo P. Eclavea, J.D., Janice Holben, J.D., Karl Oakes, J.D. and Eric C. Surette, J.D.

IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

3. Particular Kinds of Representations, Transactions, Relief, etc.

c. Transactions

§ 133. Exchange of property

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  [13\(3\)](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 193 to 196](#) (Complaints, petitions, or declarations—Fraud in exchange transactions)

As a rule, in order to constitute fraud, a party to an exchange transaction must have made representations with an intent to deceive, either knowing the representations to be false or making them in culpable ignorance of their truth or falsity.¹ However, a positive misrepresentation made in the exchange of real property for other realty or for personalty may amount to fraud not only where it was made knowingly² but also where it was made innocently although carelessly and recklessly³ without knowledge of its falsity.⁴ In such a case the definite assertion as a fact of that which is untrue concerning that of which the party has no knowledge is tantamount in its effects to the assertion of something which the party knows to be untrue.⁵

In an action for damages for fraudulent representations inducing an exchange of land for corporate stock, it has been held that fraud may be predicated upon a false statement respecting the value of the property in which the capital of the corporation was invested, even though the defendant believed the statement to be true when the defendant made it.⁶

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Footnotes

- 1 [McMeen v. Whipple](#), 23 Ill. 2d 352, 178 N.E.2d 351 (1961).
- 2 [Kincaid v. Tant](#), 180 S.W. 1103 (Tex. Civ. App. Fort Worth 1914).
- 3 [Rhodes v. Uhl](#), 189 Iowa 408, 178 N.W. 394 (1920).
- 4 [Aldrich v. Scribner](#), 154 Mich. 23, 117 N.W. 581 (1908); [Beatty v. Bulger](#), 28 Tex. Civ. App. 117, 66 S.W. 893 (1902).
- 5 [Howe v. Martin](#), 1909 OK 105, 23 Okla. 561, 102 P. 128 (1909).
- 6 [Romine v. Thayer](#), 74 Ind. App. 536, 128 N.E. 456 (1920).

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37 Am. Jur. 2d Fraud and Deceit § 134

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IV. False Representations


F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

4. Intent or Knowledge as Relating to Relief

§ 134. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  4, 13(2), 13(3)

False representations that are made with knowledge of their falsity and with a fraudulent intent are, of course, ground for relief in equity¹ as well as at law.² Such relief is also granted where statements are made recklessly, without regard to truth or falsity.³ As a general rule, however, courts of equity will grant appropriate relief in cases involving transactions arising from misstatements, even though no fraudulent intent on the part of the person making the representations is shown, and even though the person made them innocently, as a result of misapprehension or mistake.⁴ The elements of scienter, that is, knowledge of falsity and intention to obtain advantage by deceit, are not essential if the plaintiff seeks to prove that a misrepresentation constituted only equitable fraud.⁵

The reason generally given for the equitable rule as to innocent but false representations is that courts of equity may grant relief on the ground of constructive fraud such as would not authorize relief by way of an action of deceit at law.⁶ The equitable rule applies in all cases in which the jurisdiction of equity is invoked, so, for example, the rule applies where the relief sought is rescission⁷ or cancellation;⁸ or to have a constructive trust decreed.⁹

In at least one jurisdiction, in order to secure relief for fraud in equity, it must be established that representations were made with knowledge of their falsity, or with what is regarded as equivalent to such knowledge.¹⁰ Also, statutes providing for equitable remedies for fraudulent conduct may require proof of intentional conduct.¹¹

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Footnotes

- 1 Standard Motors Finance Co. v. Mitchell Auto Co., 173 Ark. 875, 293 S.W. 1026, 57 A.L.R. 877 (1927);
Ellenburg v. Edward K. Love Realty Co., 332 Mo. 766, 59 S.W.2d 625 (1933).
- 2 §§ 119 to 121.
- 3 § 122.
- 4 In re Brandywine Volkswagen, Ltd., 306 A.2d 24 (Del. Super. Ct. 1973), judgment aff'd, 312 A.2d 632 (Del.
1973); Kroninger v. Anast, 367 Mich. 478, 116 N.W.2d 863 (1962).
- 5 HMG/Courtland Properties, Inc. v. Gray, 749 A.2d 94 (Del. Ch. 1999); United Jersey Bank v. Kensey, 306
N.J. Super. 540, 704 A.2d 38 (App. Div. 1997).
As to the element of scienter, generally, see §§ 109 to 123.
- 6 Orr v. Rose, 1934 OK 604, 169 Okla. 387, 37 P.2d 300 (1934); Griffin v. Griffin, 125 Vt. 425, 217 A.2d
400 (1965).
- 7 § 135.
- 8 Am. Jur. 2d, Cancellation of Instruments §§ 13, 16.
- 9 Orr v. Rose, 1934 OK 604, 169 Okla. 387, 37 P.2d 300 (1934).
- 10 Baxter v. Davis, 252 Ky. 525, 67 S.W.2d 678 (1934).
- 11 Wal-Mart Stores, Inc. v. AAA Asphalt, Inc., 677 So. 2d 93 (Fla. 1st DCA 1996).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

4. Intent or Knowledge as Relating to Relief

§ 135. Rescission

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  4, 13(2), 13(3)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 7, 8](#) (Complaint, petition, or declaration—For rescission of agreement induced by fraud—General form)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 9 to 16](#) (Complaint, petition, or declaration—For rescission of agreement induced by fraud—Specific acts of fraud)

False representations made with knowledge of their falsity, with intent to deceive, or with what is regarded in law as equivalent to such knowledge, constitute, of course, such fraud as will authorize the rescission of a contract.¹ However, many cases have distinguished between the willful or reckless misrepresentation essential to the maintenance of an action for deceit, and the misrepresentation, negligent or innocent, that will ordinarily lay a sufficient basis for rescission in equity.² Thus, many courts lay down the rule that misrepresentation of material facts may be a ground for rescinding or avoiding a contract even though there is no actual fraud³ or intent to deceive or misrepresent,⁴ and even though the statements are innocently made⁵ without knowledge of their falsity.⁶ Such a representation is considered to be constructively fraudulent because of its effect of imposing on and deceiving the person to whom it is made.⁷ Where there is a relationship of trust and confidence, the transaction may be rescinded even though the false statement was made in good faith.⁸

Footnotes

- 1 [Kackley v. Webber](#), 310 Ky. 285, 220 S.W.2d 587, 9 A.L.R.2d 500 (1949).
- 2 [Monier v. Guaranty Trust Co. of New York](#), 82 F.2d 252, 104 A.L.R. 912 (C.C.A. 2d Cir. 1936).
While innocent misrepresentations are sufficient for rescission, they cannot be the basis of a recovery of damages for fraud. [Sheridan Drive-In, Inc. v. State](#), 16 A.D.2d 400, 228 N.Y.S.2d 576 (4th Dep't 1962).
- 3 [General Finance Corporation v. Keystone Credit Corporation](#), 50 F.2d 872 (C.C.A. 4th Cir. 1931); [Hutson v. Hutson](#), 168 Md. 182, 177 A. 177 (1935); [Ellenburg v. Edward K. Love Realty Co.](#), 332 Mo. 766, 59 S.W.2d 625 (1933).
- 4 [Junius Const. Co. v. Cohen](#) (State Report title: [Junius Const. Corp. v. Cohen](#)), 257 N.Y. 393, 178 N.E. 672 (1931).
- 5 [Smith v. Richards](#), 38 U.S. 26, 10 L. Ed. 42, 1839 WL 4314 (1839); [Metropolitan Life Ins. Co. v. Becraft](#), 213 Ind. 378, 12 N.E.2d 952, 115 A.L.R. 93 (1938); [Hudspeth v. Zorn](#), 292 S.W.2d 271 (Mo. 1956).
A suit in equity to rescind a contract for innocent misrepresentation is one sounding in "fraud." [Horne v. Timbanard](#), 6 Ariz. App. 518, 434 P.2d 520 (1967).
- 6 [Kroninger v. Anast](#), 367 Mich. 478, 116 N.W.2d 863 (1962).
- 7 [Pacific Finance Corp. v. McGowan](#), 105 Cal. App. 216, 287 P. 139 (2d Dist. 1930).
- 8 [Morgan v. Owens](#), 228 Ill. 598, 81 N.E. 1135 (1907); [Myler v. Fidelity Mut. Life Ins. Co. of Philadelphia](#), 1917 OK 371, 64 Okla. 293, 167 P. 601 (1917).

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IV. False Representations

F. Intent to Deceive, or to Induce Reliance; Knowledge of Falsity

4. Intent or Knowledge as Relating to Relief

§ 136. Fraud as a defense

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  4, 13(2), 13(3)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 197 to 205 \(Answers—Fraud as a defense\)](#)

Some courts hold that in order to sustain a defense of fraudulent representation, it is insufficient to show that the representations made were simply false but that a fraudulent intent in the party making them must also be shown.¹ Where this rule obtains, in order to constitute a good defense in an action on a contract, it must appear that the misrepresentation was made with knowledge of its falsity² and with intent to deceive.³ Other courts hold that where fraud is relied on as a defense to a contract, fraudulent intent need not be shown⁴ and that a misrepresentation is equally available for this purpose even though it is innocently made through mistake⁵ and without knowledge of its falsity,⁶ and even though it was honestly believed to be true by the party making it.⁷

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Footnotes

- ¹ [Haigh v. White Way Laundry Co.](#), 164 Iowa 143, 145 N.W. 473 (1914).
² [Shaw v. Jacobs](#), 89 Iowa 713, 55 N.W. 333 (1893).

- 3 Haigh v. White Way Laundry Co., 164 Iowa 143, 145 N.W. 473 (1914).
- 4 J.H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906); Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N.W. 923 (1904).
- 5 Barrie v. Miller, 104 Ga. 312, 30 S.E. 840 (1898).
- 6 J.H. Clark Co. v. Rice, 127 Wis. 451, 106 N.W. 231 (1906); Standard Mfg. Co. v. Slot, 121 Wis. 14, 98 N.W. 923 (1904).
- 7 Foulks Accelerating Air Motor Co. v. Thies, 26 Nev. 158, 65 P. 373 (1901).

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IV. False Representations

G. Representations and Statements as to Particular Matters

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Research References

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

A.L.R. Library

A.L.R. Index, Constructive Fraud

A.L.R. Index, Fraud and Deceit

West's A.L.R. Digest, [Fraud](#)  27, 28

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 137. Generally

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West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

A.L.R. Library

[Remedies for fraud or misrepresentation as to heating or cooling cost of realty purchased](#), 32 A.L.R.4th 828

Trial Strategy

[Misrepresentation in Automobile Sales](#), 13 Am. Jur. Trials 253

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 7 to 64](#) (Complaint, petition, or declaration—Fraud—Miscellaneous factual circumstances and transactions)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 92 to 122](#) (Complaint, petition, or declaration—Fraud in sale of personal property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 123 to 131](#) (Complaint—Fraud in securing sales of goods on credit)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 132 to 146](#) (Complaints, petitions, or declarations—Fraud in security transactions)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 149 to 156](#) (Complaint, petition, or declaration—Fraud in sale of real property)

As a general rule, subject to certain exceptions, fraud must relate to a present or preexisting fact and cannot be predicated on representations or statements that involve mere matters of futurity or things to be done or performed in the future.¹ Thus, mere promissory statements or unkept promises cannot be made the basis of fraud.² Subject to those limitations, the scope of matters as to which fraudulent misrepresentations may be made is vast. For instance, fraud has been predicated upon—

- representations to investors by the manager of a business regarding his employment history, investment track record, and his personal financial situation.³
- representations by the president of a successful bidder, to the effect that the bidder was a small business, made in order to obtain a procurement contract.⁴
- representations by an oil and gas lessee regarding its right to cross surface estate owners' property to reach certain wells.⁵
- a representation that a person has an oral agreement with another which would be unenforceable under the statute of frauds.⁶
- representations to a subcontractor by the owner that the owner has procured and holds a bond guaranteeing the payment by the general contractor of all obligations to the subcontractors.⁷
- a representation as to the annual cost of fuel oil to heat a building.⁸
- allegations by a minority shareholder of the corporation regarding the status of a majority shareholder.⁹
- the use by companies, which are without authority to do business in a state, of names which include the state's name.¹⁰

CUMULATIVE SUPPLEMENT

Cases:

Laptop consumer failed to allege that there were representations made to him by laptop manufacturer regarding laptop's battery life that would support a claim for a duty to disclose based on partial representation in consumer's action against manufacturer under the California Consumers Legal Remedies Act (CLRA) for fraudulent omission. [West's Ann.Cal.Civ.Code § 1770\(a\)\(5, 7, 9\)](#). [Herron v. Best Buy Co. Inc.](#), 924 F. Supp. 2d 1161 (E.D. Cal. 2013).

[END OF SUPPLEMENT]

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Footnotes

- 1 §§ 84, 85, 86.
- 2 §§ 87 to 89.
- 3 [Paron Capital Management, LLC v. Crombie](#), 2012 WL 2045857 (Del. Ch. 2012).
- 4 [Systems Engineering and Sec., Inc. v. Science & Engineering Associations, Inc.](#), 962 So. 2d 1089 (La. Ct. App. 4th Cir. 2007).
- 5 [Kysar v. BP America Production Co.](#), 2012-NMCA-036, 273 P.3d 867 (N.M. Ct. App. 2012).
- 6 [Slonemsky v. Zevin](#), 239 A.D. 404, 267 N.Y.S. 589 (1st Dep't 1933).
- 7 [Champion Const. & Engineering Co. v. Bush Terminal Bldgs. Co.](#), 275 A.D. 1055, 92 N.Y.S.2d 242 (2d Dep't 1949).
- 8 [Zeliff v. Sabatino](#), 27 N.J. Super. 13, 98 A.2d 679 (App. Div. 1953), judgment rev'd on other grounds, 15 N.J. 70, 104 A.2d 54 (1954).
- 9 [Tyler v. O'Neill](#), 994 F. Supp. 603 (E.D. Pa. 1998), [aff'd](#), 189 F.3d 465 (3d Cir. 1999) (applying Pennsylvania law).
- 10 [State v. Saksniit](#), 69 Misc. 2d 554, 332 N.Y.S.2d 343 (Sup 1972).

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 138. Health, physical condition, or medical treatment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , [27](#), [28](#)

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[Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment, 42 A.L.R.4th 543](#)

[Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686](#)

Trial Strategy

[Unnecessary Surgery—Hysterectomy, 40 Am. Jur. Proof of Facts 3d 1](#)

False statements as to one's own health may be the basis of an action in fraud, and a representation that one is in good health when at the time a person knows he or she is suffering from a medical disorder will support an action in fraud.¹

A cause of action is recognized for the intentional or negligent communication of a venereal disease under either a general prima facie tort theory or fraud, deceit, and misrepresentation.² One court has stated that a person who knows that he or she has

acquired immune deficiency syndrome (AIDS) and misrepresents or conceals this knowledge from a sexual partner who then contracts AIDS as a result of unprotected sex should be liable for injuries sustained by his or her partner.³

Representations by third parties other than a physician about one person's health to another person may, under appropriate circumstances, form the basis of an action for fraud, but not if the person to whom the representation is made is unjustified in relying on those representations.⁴

The rules relating to false representations by physicians⁵ apply as well to statements by an employer's claim agent for the purpose of procuring a release⁶ and to false statements as to the nature of the injury whereby a settlement is procured, made by the agent of the person responsible for the injury.⁷

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Footnotes

- 1 [Cohen v. Kahn, 263 A.D. 728, 30 N.Y.S.2d 875 \(2d Dep't 1941\).](#)
- 2 [Doe v. Roe, 157 Misc. 2d 690, 598 N.Y.S.2d 678 \(J. Ct. 1993\).](#)
- 3 [J.B. v. Bohonovsky, 835 F. Supp. 796, 28 Fed. R. Serv. 3d 468 \(D.N.J. 1993\).](#)
- 4 [Doe v. Dilling, 228 Ill. 2d 324, 320 Ill. Dec. 807, 888 N.E.2d 24 \(2008\)](#) (plaintiff's claim that the parents of plaintiff's fiance had misrepresented to her that the fiance suffered from heavy-metal poisoning and Lyme disease, when the fiance had allegedly been diagnosed with AIDS, and that plaintiff reasonably relied on those representations in delaying HIV testing).
- 5 [§ 139.](#)
- 6 [Scheer v. Rockne Motors Corporation, 68 F.2d 942 \(C.C.A. 2d Cir. 1934\); Graham v. Atchison, T. & S.F. Ry. Co., 176 F.2d 819 \(9th Cir. 1949\); Duncan v. Texas Employers' Ins. Ass'n, 105 S.W.2d 403 \(Tex. Civ. App. San Antonio 1937\), writ dismissed.](#)
As to false representations by physicians, generally, see [§ 139.](#)
- 7 [Scheer v. Rockne Motors Corporation, 68 F.2d 942 \(C.C.A. 2d Cir. 1934\).](#)

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 139. Health, physical condition, or medical treatment—Statements by physicians and hospitals

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

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[Liability of Hospice in Tort, in Contract, or Pursuant to Statute, for Maltreatment or Mistreatment of Patient, 95 A.L.R.6th 479](#)

[Liability of Hospice in Tort, in Contract, or Pursuant to Statute, for Maltreatment or Mistreatment of Patient, 95 A.L.R.6th 479](#)

[Medical malpractice: liability based on misrepresentation of the nature and hazards of treatment, 42 A.L.R.4th 543](#)

[Modern status of rules as to avoidance of release of personal injury claim on ground of mistake as to nature and extent of injuries, 13 A.L.R.4th 686](#)

Trial Strategy

[Unnecessary Surgery—Hysterectomy, 40 Am. Jur. Proof of Facts 3d 1](#)

Whether fraud may be based on statements by a physician to an injured person as to the duration of the injured person's injuries generally depends on whether such statements are intended or understood to be mere expressions of opinion upon which the

person to whom they are made has no right to rely, or whether it was intended that they should be received, and whether they were received, as statements of fact.¹ A physician has a duty not to defraud a patient by intentionally misrepresenting the number of required treatments although this duty does not arise by virtue of the physician's specialized expertise or status as professional.² However, a physician's representations as to the expected result of an operation does not support a claim of fraud, absent evidence that the physician did not intend to accomplish the exact result the physician stated.³

An action for fraud may be stated where a physician misrepresents the results of surgery performed by the physician.⁴ Where a patient has a cause of action against a physician for negligence or malpractice and is deceived by intentional and knowing lies and fraud of the physician to the extent that the patient, in reliance on the fraudulent concealment by the physician, does not bring an action for malpractice within the period of the applicable statute of limitations, the patient may maintain an action for fraud against the physician, not on account of the original negligence or malpractice, but on account of the fraud of the physician that deceived the patient with the consequence that the time bar ran against the original action.⁵ It has been held in this regard that in order to have a separate cause of action for fraud based upon a physician's concealment of the physician's own malpractice, the medical malpractice plaintiff must show that the personal injuries caused by the fraud were different from those caused by the malpractice.⁶

Where a physician knowingly and intentionally represents that the physician can administer safely a substance that in fact can be administered only under restrictions and controls of a state or federal authority, and the physician administers that substance without a requisite permit and without informing the patient of the restrictions and dangers, the patient can maintain an action for fraud, as well as malpractice.⁷ Similarly, an individual treated by a person engaged in the unlicensed practice of dentistry may base a cause of action for fraud on such person's material false representations or concealment of a material existing fact.⁸ However, there can be no action for fraud against a hospital or physicians in the absence of a material misrepresentation of fact.⁹

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Footnotes

- 1 [Tulsa City Lines v. Mains](#), 107 F.2d 377 (C.C.A. 10th Cir. 1939); [Conklin v. Missouri Pac. R. Co.](#), 331 Mo. 734, 55 S.W.2d 306 (1932).
- 2 [Boggs v. Bosley Medical Institute, Inc.](#), 228 Ga. App. 598, 492 S.E.2d 264 (1997).
- 3 [Stone v. Foster](#), 106 Cal. App. 3d 334, 164 Cal. Rptr. 901 (3d Dist. 1980).
- 4 [Nutt v. Carson](#), 1959 OK 76, 340 P.2d 260 (Okla. 1959).
- 5 [Robinson v. Shah](#), 23 Kan. App. 2d 812, 936 P.2d 784 (1997).
- 6 [Harkin v. Culleton](#), 156 A.D.2d 19, 554 N.Y.S.2d 478 (1st Dep't 1990).
- 7 [Nelson v. Gaunt](#), 125 Cal. App. 3d 623, 178 Cal. Rptr. 167 (1st Dist. 1981).
- 8 [Adames v. Velasquez](#), 19 Misc. 3d 881, 855 N.Y.S.2d 343 (Sup 2008).
- 9 [Parham v. Florida Health Sciences Center, Inc.](#), 35 So. 3d 920 (Fla. 2d DCA 2010), review dismissed, 38 So. 3d 771 (Fla. 2010).

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 140. Marriage, generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

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["Wrongful adoption" causes of action against adoption agencies where children have or develop mental or physical problems that are misrepresented or not disclosed to adoptive parents, 74 A.L.R.5th 1](#)

[Sexual partner's tort liability to other partner for fraudulent misrepresentation regarding sterility or use of birth control resulting in pregnancy, 2 A.L.R.5th 301](#)

A promise to marry made by one who knows that a lawful marriage is not possible because a prior marriage remains undissolved is a fraudulent promise.¹ One putative spouse can maintain a cause of action for fraud against the other for allegedly concealing his or her marital status at the time of their purported marriage.² It has been said in this regard that a statute barring claims for damages for breach of a promise to marry does not bar a claim for fraud merely because the fraudulent misrepresentation involves an intention to marry.³ However, where a woman knows that a man who has promised to marry her is already married, and the woman cannot by reason of public policy maintain a contract action for the defendant's breach of the promise to marry, the woman cannot sue in tort for fraud based on the promise to marry.⁴

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Footnotes

- 1 In re Marriage of Buckley, 133 Cal. App. 3d 927, 184 Cal. Rptr. 290 (1st Dist. 1982); Thorpe v. Collins, 245 Ga. 77, 263 S.E.2d 115 (1980).
- 2 Holcomb v. Kincaid, 406 So. 2d 650 (La. Ct. App. 2d Cir. 1981), writ denied, 410 So. 2d 1136 (La. 1982), reconsideration not considered, 410 So. 2d 1148 (La. 1982) and reconsideration not considered, 412 So. 2d 991 (La. 1982).
- 3 Turner v. Shavers, 96 Ohio App. 3d 769, 645 N.E.2d 1324 (10th Dist. Franklin County 1994).
- 4 Thorpe v. Collins, 245 Ga. 77, 263 S.E.2d 115 (1980).

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37 Am. Jur. 2d Fraud and Deceit § 141

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1. In General

§ 141. Conception, birth control, and adoption

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

A.L.R. Library

[Sexual partner's tort liability to other partner for fraudulent misrepresentation regarding sterility or use of birth control resulting in pregnancy, 2 A.L.R.5th 301](#)

A father is not permitted to maintain a misrepresentation claim against a mother even if she intentionally misrepresents her ability to conceive.¹ Public policy precludes tort actions to recover compensatory or punitive damages in connection with representations concerning birth control made before or during sexual relationships between consenting adults where the alleged wrong results in the birth of a normal, healthy child.² Similarly, public policy precludes a father, who is married to a woman other than the mother at the time of a child's conception, from maintaining an action against the mother for intentional misrepresentation, based on assertions that the father relied on the mother's assurances that she had taken adequate contraceptive measures.³ Tort liability cannot apply to the choice, however motivated, of whether to conceive or bear a child, and although a defendant may deliberately misrepresent his intentions to a plaintiff in order to persuade her to have an abortion, their procreative decisions are so intensely private that courts will not intervene.⁴

Adoptive parents may recover for an adoption agency's material misrepresentations of fact about a child's history prior to adoption.⁵ However, an action for wrongful adoption may not lie where the information provided is sufficient to predict any future health or emotional problems.⁶

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Footnotes

- 1 [Moorman v. Walker](#), 54 Wash. App. 461, 773 P.2d 887 (Div. 1 1989).
- 2 [C.A.M. v. R.A.W.](#), 237 N.J. Super. 532, 568 A.2d 556, 2 A.L.R.5th 1043 (App. Div. 1990).
A man voluntarily cohabiting with a woman cannot maintain a cause of action for fraud against a woman falsely claiming to practice birth control, when the woman became pregnant and delivered a child. [Jose F. v. Pat M.](#), 154 Misc. 2d 883, 586 N.Y.S.2d 734 (Sup 1992).
- 3 [Welzenbach v. Powers](#), 139 N.H. 688, 660 A.2d 1133 (1995).
- 4 [Perry v. Atkinson](#), 195 Cal. App. 3d 14, 240 Cal. Rptr. 402 (4th Dist. 1987).
- 5 [Mohr v. Com.](#), 421 Mass. 147, 653 N.E.2d 1104, 74 A.L.R.5th 693 (1995); [Burr v. Board of County Com'rs of Stark County](#), 23 Ohio St. 3d 69, 491 N.E.2d 1101, 56 A.L.R.4th 357 (1986); [Gibbs v. Ernst](#), 538 Pa. 193, 647 A.2d 882 (1994).
- 6 [Richard P. v. Vista Del Mar Child Care Service](#), 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (2d Dist. 1980).

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G. Representations and Statements as to Particular Matters

1. In General

§ 142. Employment

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  [27](#), [28](#)

A.L.R. Library

[Employer's liability, under state law, for fraud or misrepresentation inducing employee to take early retirement, 14 A.L.R.5th 537](#)

[Employer's misrepresentation as to prospect, or duration of, employment as actionable fraud, 24 A.L.R.3d 1412](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 28](#) (Complaint, petition, or declaration—For damages—Misrepresentation in soliciting prospective employees)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 29](#) (Complaint, petition, or declaration—For damages—False promise of employment)

An employee states a cause of action for fraud against an employer by alleging that the employee relies to his or her detriment on misinformation supplied by the employer.¹ This rule has been applied with respect to false representations concerning—

— the necessity that an employee on disability leave immediately return to work.²

— the length of employment.³

— the employer's willingness to pay hourly production workers for all time compensable under the Fair Labor Standards Act.⁴ On the other hand, the courts have dismissed fraud claims brought by employees where the employer did not make any actionable misrepresentation⁵ or where the employer's statements did not justify a subsequent action taken by the employee and thus did not support the claim for fraud.⁶

In the context of preemployment discussions, a general statement that a company's executives enjoy a stable and secure tenure is neither an actionable misrepresentation nor one upon which an employee can justifiably rely.⁷ A representation to a potential employee that the applicant can expect to earn a certain amount per year is insufficient to support a fraud claim where the employee understands that the income figure is based on sales and is not an absolute guarantee.⁸ Similarly, a former employee cannot recover for fraudulent misrepresentation for statements as to the employee's future employment status made in connection with the signing of a separation agreement and release where the employee fails to show that the employer promised the employee anything other than consulting services, and it continued to utilize the employee in that capacity.⁹

The general rule that promissory statements do not generally support an action for fraud¹⁰ is followed with respect to promises of employment¹¹ although there are exceptions with regards to this type of promise.¹² It has been held that liability can not be premised on promises of a job for life with yearly income at a certain level.¹³ Similarly, promises as to the management of a plaintiff's pension plan involve promises of future performance and thus do not give rise to liability for tortious misrepresentation.¹⁴ However, promises by an educational institution of employment upon graduation have been treated as actionable.¹⁵

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Footnotes

- 1 [Freedman v. Pearlman](#), 271 A.D.2d 301, 706 N.Y.S.2d 405 (1st Dep't 2000) (misrepresentations regarding income).
- 2 [Pugh v. Kaiser Aluminum & Chemical Sales, Inc.](#), 369 So. 2d 796 (Ala. 1979).
- 3 [Finch v. Brenda Raceway Corp.](#), 22 Cal. App. 4th 547, 27 Cal. Rptr. 2d 531 (1st Dist. 1994).
- 4 [Anderson v. Sara Lee Corp.](#), 508 F.3d 181 (4th Cir. 2007) (applying North Carolina law).
- 5 [Davis v. Dawson, Inc.](#), 15 F. Supp. 2d 64 (D. Mass. 1998).
- 6 [Glasgow v. Sherwin-Williams Co.](#), 901 F. Supp. 1185 (N.D. Miss. 1995), *aff'd*, 146 F.3d 867 (5th Cir. 1998); [Hayes v. Cleveland Pneumatic Co.](#), 92 Ohio App. 3d 36, 634 N.E.2d 228 (8th Dist. Cuyahoga County 1993).
- 7 [Whelan v. CareerCom Corp.](#), 711 F. Supp. 198 (M.D. Pa. 1989) (applying Pennsylvania law).
- 8 [Wilson v. Popp Yarn Corp.](#), 680 F. Supp. 208 (W.D. N.C. 1988); [Penzell v. Taylor](#), 219 Ill. App. 3d 680, 162 Ill. Dec. 142, 579 N.E.2d 956 (1st Dist. 1991) (particularly where the statement was further conditioned on the executive's best efforts).
- 9 [Horton v. Telxon Corp.](#), 99 Ohio Misc. 2d 83, 716 N.E.2d 786 (C.P. 1999).
- 10 As to false representations by physicians, generally, see § 139.
- 11 [Scullin v. Newman](#), 127 Ark. 227, 191 S.W. 922 (1917); [Hudson v. Venture Industries, Inc.](#), 147 Ga. App. 31, 248 S.E.2d 9 (1978), judgment *aff'd*, 243 Ga. 116, 252 S.E.2d 606 (1979).
- 12 [Lewis v. Finetex, Inc.](#), 488 F. Supp. 12 (D.S.C. 1977) (oral promise to hire for 18 months); [Payne v. Scholnick](#), 257 A.D. 923, 12 N.Y.S.2d 242 (4th Dep't 1939) (inducing plaintiff to leave his employment

and enter the defendant's on the assurance that the latter was going to stay in business, whereas he intended to sell out as soon as possible); [Mid-West Chevrolet Corp. v. Noah, 1935 OK 665, 173 Okla. 198, 48 P.2d 283 \(1935\)](#) (automobile dealer's deliberate misrepresentation to a truck purchaser that he would be given certain work with the truck).

13 [Barrett v. Independent Order of Foresters, 625 F.2d 73 \(5th Cir. 1980\)](#) (applying Georgia law).

14 [Stoler v. Metropolitan Life Ins. Co., 287 So. 2d 694 \(Fla. 3d DCA 1974\)](#).

15 [Schwitters v. Des Moines Commercial College, 199 Iowa 1058, 203 N.W. 265 \(1925\)](#) (promise that a commercial school student could complete the course and obtain a position in a certain number of weeks).

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G. Representations and Statements as to Particular Matters

1. In General

§ 143. Insurance

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Trial Strategy

[Actions on Life Insurance Policies](#), 12 Am. Jur. Trials 549

An action in tort may be based upon a misrepresentation that insurance coverage has been effected when no policy or binder has been issued, especially where monthly premiums have been collected and retained on an insurance policy found not to have existed.¹ The act of accepting premiums constitutes a representation by an insurer that a policy is in full force and effect, and such a representation, when made without the corresponding intent to pay the proceeds in the event of a claim and coupled with reliance by the insured, constitutes willful fraud.²

Allegations that an insurer had actual knowledge that the life insurance policies it sold insureds violated existing tax law when sold, contrary to the insurer's written and oral representations, sufficiently allege misrepresentation of a material fact, as required to state a fraud claim.³

On the other hand, a title insurer is not liable in fraud to an insured purchaser for failing to include coverage for mechanics' liens in an owner's policy where there is no obligation to provide the owner's a policy covering mechanics' liens; there is no misrepresentation about what the policy excludes, either intentionally, recklessly, or otherwise; and the purchasers never express

a desire for a policy that does not exclude mechanics' liens.⁴ Moreover, an automobile insurer has no duty independent of the insurance policy to inform the insured of benefits to which he or she might be entitled, and thus, the insurer's failure to disclose does not amount to negligence or silent fraud, where the insured does not claim that the insurer made any specific misrepresentations, and there is no indication that the insurer provided partial, misleading information.⁵ Similarly, an insured's action against a homeowner's insurer under a theory of apparent authority, based on the alleged misrepresentations of an insurance agency with regard to the existence of flood coverage under the policy, is barred by the "duty to read" and "imputed knowledge" doctrines where the alleged misrepresentations were made by the agency to the insureds rather than to the insurer, and the insureds possessed the policy, which directly conflicted with the alleged misrepresentations, well before the loss occurred.⁶

CUMULATIVE SUPPLEMENT

Cases:

Insured, whose premium for long-term care policy increased over 76% after expiration of policy's ten-year rate guarantee rider, did not sufficiently allege that insurer had duty to disclose that it was going to raise future rates far in excess of 20%, and, thus, failed to state claim for fraudulent omissions under Illinois law, since fact that insured's highest level of education was high school and that she had no knowledge related to long-term care insurance did not create any special relationship of trust and confidence, and insurer's statement that it "may" impose rate increase meant that insurer had right to change rates, rather than any half-truth concerning possibility that insurer would change rates. [Toulon v. Continental Casualty Company](#), 877 F.3d 725 (7th Cir. 2017).

Under New York law, to establish a fiduciary duty, as required for negligent misrepresentation claim, an insured must plead some extraordinary circumstance, such as efforts by an insurer to gain the insured's trust or confidence. [Paraco Gas Corp. v. Travelers Cas. and Sur. Co. of America](#), 51 F. Supp. 3d 379 (S.D. N.Y. 2014).

Automobile repair shop failed to adequately allege that insurers had a special relationship with the shop imposing a duty on them to impart correct information to the plaintiff, that the insurers imparted any information to the shop, or that the shop relied on any such information, and thus shop failed to state cause of action for negligent misrepresentation in connection with insurers' alleged unlawful efforts to "steer" insureds with claims for damage to their commercial vehicles away from shop. [Pesce Bros., Inc. v. Cover Me Ins. Agency of NJ, Inc.](#), 144 A.D.3d 1120, 43 N.Y.S.3d 85 (2d Dep't 2016).

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Footnotes

- 1 [Young v. Carrollton Federal Sav. & Loan Ass'n](#), 159 Ga. App. 836, 285 S.E.2d 264 (1981).
- 2 [Intercontinental Life Ins. Co. v. Lindblom](#), 598 So. 2d 886 (Ala. 1992).
- 3 [Zarella v. Pacific Life Ins. Co.](#), 809 F. Supp. 2d 1357 (S.D. Fla. 2011) (applying Florida law).
- 4 [Clements v. Mississippi Valley Title Ins. Co.](#), 612 So. 2d 1172 (Ala. 1992).
- 5 [Dugan v. State Farm Mut. Auto. Ins. Co.](#), 845 F. Supp. 2d 803 (E.D. Mich. 2012) (applying Michigan law).
- 6 [Mladineo v. Schmidt](#), 52 So. 3d 1154 (Miss. 2010).

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1. In General

§ 144. Insurance—Fraud by insured or third party

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Trial Strategy

[Actions on Life Insurance Policies](#), 12 Am. Jur. Trials 549

A bank, operating as a premium finance agency, is liable to an insurer, under a theory of negligent misrepresentation, for incorrectly notifying the insurer that a policy has been cancelled where the bank knows that the statement of cancellation is required by the insurer for a serious purpose; the bank knows that the insurer will rely on the notice of cancellation and will be damaged by its reliance if the notice is either inaccurate or ineffective; and the bank, in assuming the burden of administering the policy, also assumed a correlative duty of accurately informing the insurer of its status.¹

Fraud has also been predicated on a physician's false representations to an insurer made in medical reports and billings submitted to the insurer by the physician on behalf of the insureds.²

In addition, a patient asserts fraud where a physician represents that a form is being signed to determine if there is insurance coverage when in fact the form is submitted to obtain payment³

Footnotes

- 1 [Home Mut. Ins. Co. v. Broadway Bank and Trust Co.](#), 100 Misc. 2d 228, 417 N.Y.S.2d 856 (Sup 1979), judgment aff'd, 76 A.D.2d 24, 429 N.Y.S.2d 948 (4th Dep't 1980), order aff'd, 53 N.Y.2d 568, 444 N.Y.S.2d 436, 428 N.E.2d 842, 26 A.L.R.4th 337 (1981).
- 2 [State Farm Fire and Cas. Co. v. Huynh](#), 92 Wash. App. 454, 962 P.2d 854 (Div. 1 1998).
- 3 [Thomas v. Halstead](#), 605 So. 2d 1181 (Ala. 1992) (dentist).

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1. In General

§ 145. Representations or promises as to improvements

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Fraud may be established by proof that a purchaser of land, acting as a person of ordinary prudence, has been induced to enter into a contract to buy land by a representation of the vendor, known by the latter to be false, that an improvement has been made or is in existence in the neighborhood of the land at the time of the representation.¹ The fraudulent character of a material misrepresentation of a past or existing fact, made by a vendor and relied on by a purchaser to the purchaser's damage, is not altered by the circumstance that the fact misrepresented is preparatory to an improvement to be made in the future.²

A statement by a vendor of the vendor's intention to make improvements on property adjacent to that sold, if a mere promise or expression of opinion as to the future, and made in good faith, is not fraudulent and gives the purchaser no right to rescind merely because such intention or promise is not carried out.³ However, representations of intention to improve real property where no such intention exists are fraudulent,⁴ and therefore, if it appears that the vendor has no intention of making the improvement, a representation by the vendor that the vendor intends to make an improvement in the neighborhood of the land sold will constitute fraud as against a purchaser who, as a person of ordinary prudence, relies on the representation and because of a reliance on the misrepresentations suffers damage.⁵ Thus, false representations by one disposing of land of an intention to make improvements that will benefit the property disposed of are generally regarded as ground for rescinding the contract⁶ and a good defense to a suit for its specific performance.⁷

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Footnotes

- 1 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922); Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912).
Adjacent landowners who sold a lot to the plaintiffs and represented to them that the cottage obstructing the view of the ocean would be removed were guilty of fraud when the cottage was moved to an adjacent lot and continued to block the plaintiffs' view. *Malerba v. Warren*, 108 Misc. 2d 785, 438 N.Y.S.2d 936 (Sup 1981), judgment modified on other grounds, 96 A.D.2d 529, 464 N.Y.S.2d 835 (2d Dep't 1983).
- 2 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922); Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912).
- 3 Mid-Continent Life Ins. Co. v. Pendleton, 202 S.W. 769 (Tex. Civ. App. San Antonio 1918); Stewart v. Larkin, 74 Wash. 681, 134 P. 186 (1913).
As to statements as to future events, generally, see §§ 84, 85, 86.
As to promises made with intention not to perform, see §§ 94 to 100.
- 4 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922).
- 5 Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912).
- 6 Pocatello Security Trust Co. v. Henry, 35 Idaho 321, 206 P. 175, 27 A.L.R. 337 (1922); Rodgers v. Johnson, 47 S.D. 131, 196 N.W. 295 (1923).
- 7 Roberts v. James, 83 N.J.L. 492, 85 A. 244 (N.J. Ct. Err. & App. 1912); Mid-Continent Life Ins. Co. v. Pendleton, 202 S.W. 769 (Tex. Civ. App. San Antonio 1918).
As to fraud as defeating specific performance, generally, see *Am. Jur. 2d, Specific Performance* §§ 63 to 68.

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1. In General

§ 146. Representations or promises as to improvements—By vendee or transferee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

If a purchaser, to induce a vendor to make a sale, promises to make certain improvements upon the land or improvements in the neighborhood that would enhance the value of other land of the vendor or that would otherwise benefit the vendor, when the purchaser has no intention of doing so, the vendor may rescind the transaction.¹ However, a mere promise by the vendee in regard to improvements to be located on the property is not fraud unless the promise is a device to accomplish fraud.²

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Footnotes

- 1 [Braddy v. Elliott](#), 146 N.C. 578, 60 S.E. 507 (1908).
- 2 [Braddy v. Elliott](#), 146 N.C. 578, 60 S.E. 507 (1908); [Chicago, T. & M.C. Ry. Co. v. Titterington](#), 84 Tex. 218, 19 S.W. 472 (1892).

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1. In General

§ 147. Purpose for which property is acquired or intended use thereof

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

Trial Strategy

[Real-Estate Broker's Misrepresentation or Nondisclosure as to Condition or Value of Realty, 39 Am. Jur. Proof of Facts 3d 309](#)

A misstatement or misrepresentation made in the negotiations for the purchase of land as to the use that the purchaser intends to make of the land or the purpose for which the purchaser wants it does not necessarily constitute fraud,¹ especially where the use for a different purpose from that stated does not injuriously affect the vendor by reason of the vendor's ownership of other land in the vicinity.² A false statement or representation relating to the purpose for which the purchaser is buying the land or to the use that the purchaser intends to make of it is of no consequence unless it appears that the statement or representation made was material and that the vendor relied upon it and was induced to enter into the contract thereby.³ However, some courts hold that statements by a purchaser of, or by one similarly acquiring, land as to the use the purchaser intends to make of it are statements of existing facts, and not mere promises of what will be done in the future, and if false and known to be false by the purchaser will warrant the vendor in rescinding the contract of sale if relied on by the vendor to the vendor's damage as, for example, a statement by the purchaser that the purchaser intends to erect dwellings on the property when in fact the purchaser intends to erect a garage.⁴ Indeed, many courts take the position that fraud entitling the vendor to rescind may be found from the facts that the purchaser induced the vendor to sell by falsely representing the use for which the purchaser desired the land,

knowing that the sale would not be made if the vendor was aware of the purpose or use for which the purchaser wanted the land, particularly where such use of the land would injure the value of other land in the vicinity.⁵

No charge of fraud will lie where the intended use of property is stated in good faith, but the purchaser afterward changes his or her mind.⁶ The mere fact that the purpose of the purchaser is speculation, and that the purchaser intends to make a profit out of the transaction, does not constitute fraud or unfair dealing, for this is frequently the purpose of purchasing property.⁷

Conversely, statements by a vendor or the vendor's agent to the effect that property may be used for a specific purpose when in fact it cannot is evidence of fraud.⁸

CUMULATIVE SUPPLEMENT

Cases:

Under Florida law, defendant engaged in common-law fraud by engaging in scheme involving the unauthorized and unlawful sale of wireless service provider's prepaid airtime minutes; defendant knowingly made false statements to provider's employees in order to coerce them into adding free airtime to prearranged phone numbers, and provider's employees acted upon defendant's false statements and added free airtime minutes to certain phone numbers, which resulted in financial loss to provider. [TracFone Wireless, Inc. v. Adams](#), 98 F. Supp. 3d 1243 (S.D. Fla. 2015).

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Footnotes

- 1 [Stackpole v. Hancock](#), 40 Fla. 362, 24 So. 914 (1898).
- 2 [Parsons v. Detroit & M.R. Co.](#), 122 Mich. 462, 81 N.W. 343 (1899); [State v. Blize](#), 37 Or. 404, 61 P. 735 (1900).
- 3 [Lucas v. Long](#), 125 Md. 420, 94 A. 12 (1915); [Brown v. Honiss](#), 74 N.J.L. 501, 68 A. 150 (N.J. Ct. Err. & App. 1907).
- 4 [Adams v. Gillig](#), 199 N.Y. 314, 92 N.E. 670 (1910); [Whitcomb v. Moody](#), 49 S.W.2d 513 (Tex. Civ. App. Waco 1932), writ refused, (July 19, 1932).
- 5 [Brett v. Cooney](#), 75 Conn. 338, 53 A. 729 (1902); [Adams v. Gillig](#), 199 N.Y. 314, 92 N.E. 670 (1910).
- 6 [Bryan v. Louisville & N.R. Co.](#), 292 Mo. 535, 238 S.W. 484, 23 A.L.R. 537 (1921).
- 7 [Cummins v. Beavers](#), 103 Va. 230, 48 S.E. 891 (1904).
- 8 [Lepera v. Fuson](#), 83 Ohio App. 3d 17, 613 N.E.2d 1060 (1st Dist. Hamilton County 1992).

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1. In General

§ 148. Representations to contractor as to amount or character of work, materials, cost, or soil conditions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Misrepresentations with reference to matters affecting the amount or character of work to be performed under a contract, or the cost or expense of the performance thereof, may constitute the basis for rescission of the contract¹ or for an action for damages in fraud and deceit.² This rule would seem to be most frequently applicable to building and construction contracts.³ While indefinite statements, expressions of opinion, and conjectural views as to the amount of work or materials or the cost thereof are not actionable,⁴ statements purporting to be factual and based upon superior knowledge, information, and investigation with respect to the work or materials required may constitute the basis for an action in fraud.⁵ A gross underestimate of the amount of work required, even though advanced as approximate only, may be found to be a misrepresentation of fact.⁶

Fraud justifying rescission or damages may be based in a proper case on misrepresentations by an owner to a contractor with respect to conditions below the surface.⁷ The complaint is usually based on some inaccuracy or inadequacy in notation on plans, in specifications, in the advertisements for bids, in profile drawings, or in records of soundings or of borings.⁸ Although the statement of an opinion as to the existence of certain conditions is not an actionable representation of fact, where the statement may be taken as either one of opinion or one of fact, it is for the jury to decide whether the contractor was warranted in relying upon it as one of fact.⁹

Observation:

The line between the mere presentation of the results of point borings, and the representation of general conditions based on such borings, is crossed where an owner's engineers show profile maps, or notations on plans, purporting to give subsoil conditions in general, and a contractor, under certain circumstances, may get relief on the basis of such a representation where the contractor relied upon it to the contractor's injury.¹⁰

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Footnotes

- 1 [Prest v. Inhabitants of Town of Farmington](#), 117 Me. 348, 104 A. 521, 2 A.L.R. 1390 (1918); [Long v. Inhabitants of Athol](#), 196 Mass. 497, 82 N.E. 665 (1907).
- 2 [Busch v. Wilcox](#), 82 Mich. 315, 46 N.W. 940 (1890), *aff'd*, 82 Mich. 336, 47 N.W. 328 (1890); [Sell v. Mississippi River Logging Co.](#), 88 Wis. 581, 60 N.W. 1065 (1894).
- 3 [Am. Jur. 2d, Building and Construction Contracts](#) § 110.
- 4 [Ariss-Knapp Co. v. Sonoma County](#), 73 Cal. App. 262, 238 P. 752 (1st Dist. 1925).
- 5 [Board of Water Com'rs of City of New London v. Robbins & Potter](#), 82 Conn. 623, 74 A. 938 (1910).
- 6 [Long v. Inhabitants of Athol](#), 196 Mass. 497, 82 N.E. 665 (1907).
- 7 [Elkan v. Sebastian Bridge Dist.](#), 291 F. 532 (C.C.A. 8th Cir. 1923); [Arthur A. Johnson Corp. v. Com.](#), 318 Mass. 88, 60 N.E.2d 364 (1945).
- 8 [Elkan v. Sebastian Bridge Dist.](#), 291 F. 532 (C.C.A. 8th Cir. 1923); [Arthur A. Johnson Corp. v. Com.](#), 318 Mass. 88, 60 N.E.2d 364 (1945).
- 9 [McClung Const. Co. v. Muncy](#), 65 S.W.2d 786 (Tex. Civ. App. Amarillo 1933), *writ dismissed*.
- 10 [E. & F. Const. Co. v. Town of Stamford](#), 114 Conn. 250, 158 A. 551 (1932).

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37 Am. Jur. 2d Fraud and Deceit § 149

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Fraud and Deceit

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 149. Representations as to source or supply of, capacity to produce, or sales commitments regarding, articles

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Misrepresentations of a seller as to the source of an article and capacity to manufacture it are actionable.¹ Although representations as to supply, productive capacity, and sales commitments regarding articles may, when standing alone, relate to existing facts and be actionable,² where the uncommitted capacity and supply are represented to be adequate to provide the plaintiff with a specified quantity of an article every month, apparently for an unlimited period, the representations constitute predictions or expressions of future expectations, or in the alternative, statements promissory in nature insofar as they imply an engagement or intention to maintain for the plaintiff's benefit an uncommitted capacity and supply at the level specified and are therefore not actionable.³

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Footnotes

- ¹ [Tele King Corp. v. Abeles](#), 282 A.D. 755, 123 N.Y.S.2d 95 (1st Dep't 1953).
- ² [Channel Master Corp. v. Aluminum Limited Sales, Inc.](#), 2 A.D.2d 933, 156 N.Y.S.2d 585 (3d Dep't 1956).
A statement by a district manager of a tool manufacturer to distributors that the manager had been to the company warehouse and had seen the tools and that there were enough to fill 80% of all orders was sufficient to make out claim for deceit. [Nickerson v. Matco Tools Corp., Div. of Jacobs Mfg. Co.](#), 813 F.2d 529 (1st Cir. 1987).
A statement in a project owner's letter to a steel supplier offering to tender direct payments to the supplier upon delivery of the steel to a manufacturer which had contracted to fabricate components for a steel building was not a material misrepresentation required to support a fraudulent inducement claim under

Pennsylvania law; the letter did not misrepresent that the owner guaranteed to satisfy the supplier's invoices if the manufacturer failed to do so but was instead an administrative proposal to streamline payments. [EBC, Inc. v. Clark Bldg. Systems, Inc.](#), 618 F.3d 253, 77 Fed. R. Serv. 3d 421 (3d Cir. 2010) (applying Pennsylvania law).

3 [Channel Master Corp. v. Aluminum Limited Sales, Inc.](#), 2 A.D.2d 933, 156 N.Y.S.2d 585 (3d Dep't 1956).

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IV. False Representations

G. Representations and Statements as to Particular Matters

1. In General

§ 150. Falsely attesting signature; attesting instrument without seeing it signed

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  [27](#), [28](#)

A.L.R. Library

[Civil liability of witness falsely attesting signature to document, 96 A.L.R.2d 1346](#)

[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Fraud may be predicated upon the attesting of a signature, knowing it to be false.¹ Moreover, one who attests an instrument without seeing it signed may be liable in fraud on the basis of an implied misrepresentation where the signature to the instrument is not genuine.² Thus, a person who falsely attests that a signature on a document has been made in the person's presence or acknowledged by the signer in the person's presence has been held liable to another who relies on the false attestation and suffers damage thereby.³ On the other hand, civil liability predicated upon the act of a witness in falsely attesting a signature to a document has been denied.⁴

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Footnotes

¹ [Mendenhall v. Stewart, 18 Ind. App. 262, 47 N.E. 943 \(1897\).](#)

- 2 McCray Refrigerator Co. v. Uramoto, 79 Nev. 294, 382 P.2d 600, 96 A.L.R.2d 1339 (1963).
3 McCray Refrigerator Co. v. Uramoto, 79 Nev. 294, 382 P.2d 600, 96 A.L.R.2d 1339 (1963).
4 Motor Credit Co. v. Tremper, 121 N.J.L. 91, 1 A.2d 301 (N.J. Sup. Ct. 1938) (complaint did not contain well pleaded charge of fraud).

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2. Title, Location, Quantity, and Quality of Property

a. Title, Ownership, and Encumbrances

(1) In General

§ 151. Expressions of opinion

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

A representation as to title to property may be, in part at least, an opinion,¹ and a vendor's opinion as to title, where it is based upon facts truthfully stated, does not constitute fraud.² Accordingly, where the facts affecting a title are fully known to both of the parties to a transfer of the title, a general expression of opinion by one of them as to the condition of the title cannot, as a general rule, be made the basis of a charge of fraud.³ Hence, the transactor cannot be held responsible where the transactor merely expresses an opinion as to the legal effect of known facts and muniments of title,⁴ as to the validity of the transactor's title,⁵ or as to the transactor's rights under an instrument.⁶ On the other hand, a statement by the representor that the representor has a good title and can make a good title to the land to the representee, while embodying a conclusion from the facts relative to the title, is in effect a representation that the facts that will constitute a good title exist, especially where the representee is ignorant of land titles.⁷ Also, a false representation that a trust deed is a first lien and that there are no prior mortgages or trust deeds is a representation of fact and not a mere opinion.⁸

There is authority that where a false representation as to title or encumbrances is knowingly made with intent to deceive, it does not avail as a defense that the statement was a mere opinion.⁹

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Footnotes

- 1 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Kathan v. Comstock, 140 Wis. 427, 122 N.W. 1044 (1909).
- 2 Kosak v. Mabb, 10 Ariz. App. 432, 459 P.2d 520 (Div. 1 1969).
- 3 Choate v. Hyde, 129 Cal. 580, 62 P. 118 (1900); Cooper v. Hunter, 8 Colo. App. 101, 44 P. 944 (1896).
- 4 Venable v. Bradbury, 111 Kan. 495, 207 P. 647 (1922).
- 5 Venable v. Bradbury, 111 Kan. 495, 207 P. 647 (1922).
- 6 Rheingans v. Smith, 161 Cal. 362, 119 P. 494 (1911) (time when option would expire).
- 7 Buchanan v. Burnett, 102 Tex. 492, 119 S.W. 1141 (1909); Kathan v. Comstock, 140 Wis. 427, 122 N.W. 1044 (1909).
- 8 Kehl v. Abram, 210 Ill. 218, 71 N.E. 347 (1904).
- 9 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889) (dictum); Nipper v. Griffin Mercantile Co., 31 Ga. App. 211, 120 S.E. 439 (1923).

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(1) In General

§ 152. Transactions involving personalty

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

A misrepresentation as to the title or ownership of personal property may constitute actionable fraud.¹ Thus, false representations that the representor's property is owned by a third person are actionable.²

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Footnotes

- ¹ [General Motors Acceptance Corp. v. Fairway Dodge Sales, Inc.](#), 80 A.D.2d 740, 437 N.Y.S.2d 171 (4th Dep't 1981).
One selling a car to a dealer when knowing that the title was forged has been held liable to the dealer and a buyer of the car from the dealer for compensatory and punitive damages. [Oppenhuizen v. Wennersten](#), 2 Mich. App. 288, 139 N.W.2d 765 (1966).
- ² [Culbreath v. Investors Syndicate](#), 203 S.C. 213, 26 S.E.2d 809, 147 A.L.R. 1144 (1943).

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§ 153. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 103](#) (Complaint, petition, or declaration—Misrepresentation in sale of automobile—Encumbrance on automobile)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 166](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to ownership in fee)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 167](#) (Complaint, petition, or declaration—Misrepresentation that premises free from encumbrances—Including cause of action for breach of covenant against encumbrances)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 168](#) (Complaint, petition, or declaration—For damages—Misrepresentation that premises free from encumbrances—Existence of easement at time of purchase)

The general rule is well settled that false statements or misrepresentations by a vendor as to the vendor's title, or the character of the vendor's title, to the real estate in question, when made as a fact, or without regard to its truth or falsity, for the purpose of inducing another to purchase the same, constitute actionable fraud where a sale is induced thereby in reliance thereon and injury results therefrom, and may form the basis either for an action in tort for damages or for rescission.¹ A charge of fraud may be

based on misrepresentations of and concerning the title of the vendor where they were known to the vendor to be false and were relied on by the purchaser² even though such representations relate to matters of public record.³ This rule is applicable to false statements as to the title to fixtures upon realty,⁴ or restrictions as to its use,⁵ and has been applied to a false representation by the representor that the representor has title to the property when in fact the representor has no title,⁶ that a corporation is an owner in fee simple when in fact the corporation is merely a contract purchaser,⁷ and that a representor is a owner in fee simple when in fact the representor holds only a life estate.⁸

False statements and misrepresentations as to the existence of liens and encumbrances on property, as to liens or encumbrances affecting the interest of the representor, or as to the amount of such liens or encumbrances are usually deemed to constitute actionable fraud⁹ even though the liens and encumbrances are matters of public record.¹⁰

A representation by the vendor in a contract for the sale of land or by the vendor's agent or representative as to title, to be actionable fraud, must be made as a matter of fact rather than of opinion, and a mere expression of opinion regarding the vendor's or grantor's title or ownership, when based on facts truthfully stated or equally within the knowledge of both parties, is not a fraud even though the opinion is not well founded.¹¹ However, if the vendor assumes to represent the vendor's title as good when the vendor knows it is bad, and the vendee is deceived thereby, the vendor cannot escape liability for deceit by claiming that the representation is only a matter of opinion.¹²

A person who signs an agreement to sell real property though the person is only one of two joint owners is not liable for fraud absent proof that the person made any misrepresentations to the prospective purchaser with respect to the person's status as a joint owner or as an agent of the other owner.¹³ Similarly, a commissioner at a foreclosure sale makes no misrepresentation, either express or implied, during a sale of a property so as to render the commissioner liable on the basis of fraud to the purchaser for damages sustained when the holder of an outstanding deed of trust forecloses on the property where the commissioner does not represent to the purchaser that the deed of trust is the only lien against the property, but rather, the commissioner notifies the purchaser that the property is being sold subject to that lien and any other unpaid deeds of trust.¹⁴

CUMULATIVE SUPPLEMENT

Cases:

Allegation made in complaint of purchaser of home, that seller and real estate agency knew that there was water infiltration and water damage in or about wallboard of home, satisfied requirement for pleading of ultimate facts, but not evidentiary facts, in purchaser's action alleging breach of contract, consumer fraud, fraudulent misrepresentation, and negligent misrepresentation, since pleading was sufficient to bring purchaser's claims within causes of action alleged. [Blevins v. Marcheschi, 2018 IL App \(2d\) 170340, 421 Ill. Dec. 825, 101 N.E.3d 807 \(App. Ct. 2d Dist. 2018\).](#)

[END OF SUPPLEMENT]

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Footnotes

- 1 [Meeks v. Garner, 93 Ala. 17, 8 So. 378 \(1890\); Debral Realty, Inc. v. DiChiara, 383 Mass. 559, 420 N.E.2d 343 \(1981\); Ehrman v. Feist, 1997 ND 180, 568 N.W.2d 747 \(N.D. 1997\); Davis v. Lee, 52 Wash. 330, 100 P. 752 \(1909\) \(want of title in vendor\).](#)

- 2 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Schechinger
v. Gault, 1913 OK 118, 35 Okla. 416, 130 P. 305 (1913); Gannon, Goulding & Thies v. Hausaman, 42 Okla.
41, 140 P. 407 (1914).
- 3 Schechinger v. Gault, 1913 OK 118, 35 Okla. 416, 130 P. 305 (1913).
As to the duty to examine the public records, see § 251.
- 4 O'Daniel v. Streeby, 77 Wash. 414, 137 P. 1025 (1914).
- 5 Williamson v. Clapper, 88 Cal. App. 2d 645, 199 P.2d 337 (2d Dist. 1948).
- 6 Bryant v. Bruner, 593 S.W.2d 358 (Tex. Civ. App. Texarkana 1979).
- 7 In re Van Quach, 187 B.R. 615 (Bankr. N.D. Ill. 1995).
- 8 Ehrman v. Feist, 1997 ND 180, 568 N.W.2d 747 (N.D. 1997).
- 9 Nipper v. Griffin Mercantile Co., 31 Ga. App. 211, 120 S.E. 439 (1923); Goody v. Maryland Casualty Co.,
53 Idaho 523, 25 P.2d 1045 (1933).
In an action in which purchasers of a house sought damages and rescission due to the fraudulent concealment
of the existence of an outstanding deed of trust and in which the defendants counterclaimed for the balance
and interest due on the promissory note, the defendants could not prevail on the basis of the contention that
the existence of the deed of trust was not a material fact because the purchasers did not understand real estate
transactions and would not have changed their position even if they were informed of the deed of trust, in
light of the fact that the applicable test was whether the fact concealed would have affected the conduct of
a reasonably prudent buyer. *Osterberger v. Hites Const. Co.*, 599 S.W.2d 221 (Mo. Ct. App. E.D. 1980).
- 10 § 251.
- 11 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Buchanan
v. Burnett, 102 Tex. 492, 119 S.W. 1141 (1909).
- 12 Carr v. Sanger, 138 A.D. 32, 122 N.Y.S. 593 (2d Dep't 1910); Buchanan v. Burnett, 102 Tex. 492, 119 S.W.
1141 (1909).
- 13 Chan v. Bay Ridge Park Hill Realty Co., 213 A.D.2d 467, 623 N.Y.S.2d 896 (2d Dep't 1995).
- 14 Gibson v. Lambeth, 86 N.C. App. 264, 357 S.E.2d 404 (1987).

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§ 154. Easements, rights, privileges, and appurtenances

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 168](#) (Complaint, petition, or declaration—For damages—Misrepresentation that premises free from encumbrances—Existence of easement at time of purchase)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 172](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to zoning classifications—General form)

A purchaser of land may base a charge of fraud against the vendor on misrepresentations made by the vendor or the vendor's agent as to easements, rights, privileges, or appurtenances attached to the land sold, although the deed does not expressly include such incidents and was not intended to do so.¹ A vendor and broker's misrepresentation to a purchaser as to the zoning of a property is actionable fraud.² Fraud may also be based upon a misrepresentation by the vendor of land that it is not burdened by any easements.³

The sale of real property, subject to an easement of public record, does not have the taint of fraud by the failure of the vendor to disclose specifically an encumbrance where the vendor, in a written option to the vendee, agreed to convey title free from

encumbrances "except ... easements"⁴ The vendors of property make no false representation concerning the legal access to property where the legal access exists through an easement by implication or necessity even though no recorded easement permits access by the road.⁵

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Footnotes

- 1 [Connelly v. Merritt](#), 273 So. 2d 7 (Fla. 1st DCA 1973) (perpetual access to a lakefront); [Jupe v. City of Schertz](#), 604 S.W.2d 405 (Tex. Civ. App. San Antonio 1980), writ refused n.r.e., (Dec. 17, 1980) (misstatement of the grantor that a public road was merely a utility easement providing the city with access to water); [Gould v. James](#), 43 Wyo. 161, 299 P. 275 (1931).
- 2 [Barnes v. Lopez](#), 25 Ariz. App. 477, 544 P.2d 694 (Div. 2 1976).
A county industrial authority, in selling a purchaser a tract of land zoned for heavy manufacturing, did not do so with knowledge that the land was not suitable for that purpose, as necessary for the purchaser to establish a fraud claim. [Futch v. Lowndes County](#), 297 Ga. App. 308, 676 S.E.2d 892 (2009).
- 3 [Gilbey v. Cooper](#), 37 Ohio Misc. 119, 66 Ohio Op. 2d 366, 310 N.E.2d 268 (C.P. 1973).
- 4 [Balogh v. Sacks](#), 97 Ohio App. 17, 55 Ohio Op. 185, 123 N.E.2d 37 (9th Dist. Summit County 1954).
- 5 [Mostrong v. Jackson](#), 866 P.2d 573 (Utah Ct. App. 1993).

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§ 155. Taxes and assessments

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

The view has been taken that fraud may be predicated on misrepresentations by a vendor as to the amount of taxes or assessments on the property sold¹ even though the vendee could have ascertained the truth concerning them from an examination of the public records.² Similarly, false representations made by the rental agents of a shopping mall to a prospective tenant regarding the estimated costs of completing the mall, common area charges, and estimated taxes were opinions that could form the basis for an action for fraud where the lessee was justified in relying on the representations since only the defendants were in a position to know the information necessary to form an opinion regarding costs and taxes.³ There is, however, authority to the contrary.⁴

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Footnotes

- 1 [Crawford v. Armacost](#), 85 Wash. 622, 149 P. 31 (1915); [Woteshek v. Neumann](#), 151 Wis. 365, 138 N.W. 1000 (1912).
- 2 [§ 251](#).
- 3 [Magnaleasing, Inc. v. Staten Island Mall](#), 428 F. Supp. 1039, 23 Fed. R. Serv. 2d 1569 (S.D. N.Y. 1977), judgment aff'd, 563 F.2d 567 (2d Cir. 1977).
- 4 [Kalmans v. Powles](#), 121 Wash. 203, 209 P. 5, 29 A.L.R. 618 (1922).

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§ 156. Ownership by third person

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Trial Strategy

[Real-Estate Purchaser's Recovery of Damages in Tort for Fraudulent Misrepresentation of Quantity of Land Sold, 61 Am. Jur. Proof of Facts 3d 411](#)

Where one induces another through false and fraudulent representations to execute a contract for the purchase of real property assertedly owned by a third person, there is a cause of action in fraud for damages sustained where the third person has no right to convey the property.¹ False representations that the representor's personal property is owned by a third person are also actionable.²

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Footnotes

¹ [Fisher v. Heer, 259 A.D. 952, 20 N.Y.S.2d 147 \(3d Dep't 1940\).](#)

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§ 157. Certificate of occupancy

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Trial Strategy

[Misrepresentation in Automobile Sales](#), 13 Am. Jur. Trials 253

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 91, 113](#) (Complaint, petition, or declaration—Misrepresentation as to validity of patent)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 96](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to ownership)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 103](#) (Complaint, petition, or declaration—Misrepresentation in sale of automobile—Encumbrance on automobile)

A claim of fraud may be based upon representations by the vendor of a building that the vendor has a certificate of occupancy for the building when in fact the vendor has no such certificate.¹

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Footnotes

¹ [Federal Brush Corp. v. A. Zerega's Sons, Inc., 149 N.Y.S.2d 374 \(City Ct. 1956\).](#)

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37 Am. Jur. 2d Fraud and Deceit § 158

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IV. False Representations

G. Representations and Statements as to Particular Matters

2. Title, Location, Quantity, and Quality of Property

a. Title, Ownership, and Encumbrances

(2) Transactions Involving Real Estate

§ 158. Representations by purchaser or grantee

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 187](#) (Complaint, petition, or declaration—For rescission—Fraud in procuring deed—Deed represented as being another type of instrument—Deed misrepresented as being lease)

There are many instances in which misrepresentations made by a purchaser as to the validity of the title of the vendor or the extent of the vendor's interest in the land, when taken in connection with the peculiar circumstances, have been held to constitute a fraud.¹ Thus, misrepresentations to the owner of real estate as to the extent of the owner's interest in the property, the owner being ignorant with reference thereto, and the purchaser having knowledge of the extent of the owner's interest, are actionable.² Even though a purchaser acts honestly or without an intention to deceive, a purchaser's making of a materially false statement as to the vendor's title may entitle the latter to avoid the transaction³ although, according to most courts, it is essential in an action at law for deceit to show that the defendant either knew that the statement that the defendant made was false or that the defendant made it under circumstances raising a presumption of knowledge.⁴

A mere expression of an opinion by the purchaser as to the state of the vendor's title to property will not usually amount to such a misrepresentation as will entitle the vendor to relief, and this is especially true where the opinion is based on a legal conclusion and the purchaser does not claim any legal or special knowledge of titles.⁵ Fraud may, however, be predicated upon the grantee's opinionative statements as to title when accompanied by false statements of underlying facts.⁶ Also, where a person having or professing to have a superior knowledge of the law obtains the property of another by a false statement as to the validity of the owner's title, this amounts to fraud in equity.⁷

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Footnotes

- 1 [Woodrow v. Riverside Greyhound Club](#), 192 Ark. 770, 94 S.W.2d 701 (1936); [Tewmey v. Tewmey's Assignee](#), 251 Ky. 489, 65 S.W.2d 479 (1933).
Open slander of title by one who becomes a secret purchaser is prima facie evidence of fraud. [Weitzell's Lessee v. Fry](#), 4 U.S. 218, 4 Dall. 218, 1 L. Ed. 807, 1800 WL 3176 (Pa. 1800).
- 2 [Seeger v. Odell](#), 18 Cal. 2d 409, 115 P.2d 977, 136 A.L.R. 1291 (1941).
- 3 [Kathan v. Comstock](#), 140 Wis. 427, 122 N.W. 1044 (1909).
- 4 §§ 119 to 123.
- 5 [Morse v. Duryea](#), 174 Ky. 234, 192 S.W. 477 (1917).
- 6 [Kathan v. Comstock](#), 140 Wis. 427, 122 N.W. 1044 (1909).
- 7 [White v. Harrigan](#), 1919 OK 352, 77 Okla. 123, 186 P. 224, 9 A.L.R. 1041 (1919); [Ward v. Baker](#), 135 S.W. 620 (Tex. Civ. App. 1911), writ dismissed.

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IV. False Representations

G. Representations and Statements as to Particular Matters

2. Title, Location, Quantity, and Quality of Property

b. Location, Boundaries, or Identity

§ 159. Generally

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

The general principle is well settled that false statements or misrepresentations as to the location, boundaries, or identity of real property that is the subject of a transaction constitute actionable fraud¹ and will sustain an action of deceit² or constitute ground for rescinding the contract.³

Representations made by one who claims personal knowledge and is seeking to deal commercially cannot be considered mere matters of opinion,⁴ nor can representations that are made positively, with the intent that they be relied upon.⁵ Whenever the owner of a property undertakes to point out to the prospective purchaser boundaries of the property the owner expects to sell, the misrepresentations are matters of fact, not opinion, and in indicating boundaries, the owner must do so accurately, and a failure to do so will amount to a false representation for which the owner will be liable even though the owner acted under an honest mistake and without an intent to deceive.⁶

Footnotes

- 1 [Canady v. Mann](#), 107 N.C. App. 252, 419 S.E.2d 597 (1992).
An owner of real property is under a duty to inform himself or herself of the true boundaries of land the owner seeks to sell, and an owner who breaches this duty and misrepresents the true boundaries in the sale of property commits constructive fraud. [Stone v. Farnell](#), 239 F.2d 750 (9th Cir. 1956).
- 2 [Andrus v. St. Louis Smelting & Refining Co.](#), 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889) (wherein the rule is stated that false and fraudulent representations as to the location and condition of land may be ground for damages); [Warren v. Hugo Scherer Estate](#), 272 Mich. 254, 261 N.W. 319 (1935); [Camicia v. Iafollo](#), 89 W. Va. 422, 109 S.E. 335 (1921).
- 3 [Warren v. Hugo Scherer Estate](#), 272 Mich. 254, 261 N.W. 319 (1935).
- 4 [Warren v. Hugo Scherer Estate](#), 272 Mich. 254, 261 N.W. 319 (1935).
- 5 [Davis v. Lee](#), 52 Wash. 330, 100 P. 752 (1909).
- 6 [Murphree v. Rawlings](#), 3 Wash. App. 880, 479 P.2d 139 (Div. 2 1970).

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§ 160. Sales; representations by vendor

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West's Key Number Digest

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Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

As a general rule, a charge of fraud may be based upon misrepresentations by the vendor of land as to the location, boundaries, or identity of the land, and such misrepresentations may support an action of deceit or constitute ground for rescinding the contract.¹ This rule has been applied where a vendor either intentionally or, assuming to act on personal knowledge, falsely points out certain lines as the true boundaries² where a vendor who claims personal knowledge misrepresents the location³ or misrepresents the location positively with the intent that the representations shall be relied on,⁴ and where a vendor falsely represents that certain land is included in the tract disposed of.⁵

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Footnotes

- 1 Andrus v. St. Louis Smelting & Refining Co., 130 U.S. 643, 9 S. Ct. 645, 32 L. Ed. 1054 (1889); Lanning
- 2 v. Sprague, 71 Idaho 138, 227 P.2d 347 (1951); Blanke v. Miller, 364 Mo. 797, 268 S.W.2d 809 (1954).
- 3 Lanning v. Sprague, 71 Idaho 138, 227 P.2d 347 (1951).
- 4 Warren v. Hugo Scherer Estate, 272 Mich. 254, 261 N.W. 319 (1935).
- 5 Davis v. Lee, 52 Wash. 330, 100 P. 752 (1909).
- Arnold v. Campbell, 265 Ky. 485, 97 S.W.2d 32 (1936).

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c. Quantity; Acreage

§ 161. Generally

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[Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 A.L.R.2d 660](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 98](#) (Complaint, petition, or declaration—For damages—Delivery of lesser quantity than agreed)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 164](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to location, extent, and value of timber on land sold)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 165](#) (Complaint, petition, or declaration—Misrepresentations as amount of land in tract and flow of water on tract)

Generally, where one dealing commercially with property either overestimates or underestimates the quantity of the subject matter of the transaction and is in a position to know or form a reasonably accurate estimate thereof, fraud may be predicated upon a false representation as to quantity resulting from such estimate if the representee is not in as favorable a position as the representor and relies upon such estimate.¹ Hence, false representations as to the quantity of goods,² the area or acreage of land or buildings,³ or the quantity of timber trees growing on land⁴ may be made the basis of a charge of fraud.

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Footnotes

- 1 [Stewart v. Wyoming Cattle-Ranche Co.](#), 128 U.S. 383, 9 S. Ct. 101, 32 L. Ed. 439 (1888); [Lanning v. Sprague](#), 71 Idaho 138, 227 P.2d 347 (1951); [Marshall v. Keaveny](#), 38 N.C. App. 644, 248 S.E.2d 750 (1978); [Heise v. Pilot Rock Lumber Co.](#), 222 Or. 78, 352 P.2d 1072 (1960).
- 2 [Lanning v. Sprague](#), 71 Idaho 138, 227 P.2d 347 (1951).
- 3 [§ 162](#).
- 4 [Heise v. Pilot Rock Lumber Co.](#), 222 Or. 78, 352 P.2d 1072 (1960).

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G. Representations and Statements as to Particular Matters

2. Title, Location, Quantity, and Quality of Property

c. Quantity; Acreage

§ 162. Area of real estate

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West's Key Number Digest

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[Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 A.L.R.2d 660](#)

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[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 161, 162](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to acreage and boundaries of real property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 165](#) (Complaint, petition, or declaration—Misrepresentations as amount of land in tract and flow of water on tract)

The general principle is widely recognized that a misrepresentation by the vendor of land as to the quantity of the land may be the basis of a charge of fraud where the vendor is in a position to know or form a reasonably accurate estimate of the actual quantity

and the vendee is not as favorably situated as the vendor and relies upon the misrepresentation.¹ False statements made by vendors as to the area of the land that was the subject of a sale are frequently regarded by the courts as having been intended to be accepted by the vendee as statements of fact of which the vendor has knowledge, and not expressions of opinion, and therefore to constitute fraud or deceit and to render the vendor liable in tort for the resulting damages to the vendee.² However, where a mere estimate of the quantity is given, a charge of fraud has been held not maintainable, unless the representor intended to deceive the representee.³ Moreover, mere expressions of opinion by the representor as to the area of land or the number of acres that the tract contains cannot be made the basis of a charge of fraud,⁴ at least where the opinion is honestly entertained and there is no fraudulent intent.⁵ Also, in some jurisdictions, in the sale of real estate, the principle of caveat emptor applies to conditions open to observation and inspection, such as the location of lot lines and the amount of acreage in a lot that was part of a recorded plat on public file, and a casual verbal representation regarding a lot line and acreage do not constitute actionable fraud.⁶

Purchasers state a cause of action for fraud in connection with the purchase of a condominium unit when they allege that the defendant made a material misrepresentation about the floor dimensions of a purchased unit, purposefully inducing the purchasers to rely on it, and that the purchasers bought and prepared to move into the unit.⁷

A vendor's use of the expression "more or less," "approximately," "about," or some similar term in stating the area of the property conveyed does not prevent the vendor's being liable in fraud unless the variance between the actual area and that claimed is only slight.⁸ The mere fact that the deficiency is very large is some evidence of fraud.⁹

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Footnotes

- 1 [Owen v. Schwartz](#), 177 F.2d 641, 14 A.L.R.2d 1337 (D.C. Cir. 1949); [Fisher v. Zimmer](#), 286 A.D. 1129, 146 N.Y.S.2d 170 (3d Dep't 1955), judgment aff'd, 1 N.Y.2d 721, 151 N.Y.S.2d 932, 134 N.E.2d 681 (1956).
That the real property in question was of unusual size or irregular shape has been noted in a number of cases in which the vendor of such property was held liable for misrepresentation as to its area, which might be deemed to indicate that such size or shape was a factor in the court's determination. [Loehr v. Manning](#), 44 Wash. 2d 908, 272 P.2d 133 (1954).
- 2 [Clark v. Haggard](#), 141 Conn. 668, 109 A.2d 358, 54 A.L.R.2d 655 (1954); [Basnett v. Besett](#), 371 So. 2d 705 (Fla. 2d DCA 1979), decision approved, 389 So. 2d 995 (Fla. 1980).
- 3 [Boddy v. Henry](#), 113 Iowa 462, 85 N.W. 771 (1901).
- 4 [Fillegar v. Walker](#), 54 Ohio App. 262, 7 Ohio Op. 416, 23 Ohio L. Abs. 20, 6 N.E.2d 1010 (1st Dist. Hamilton County 1936).
- 5 [Lawson v. Floyd](#), 124 U.S. 108, 8 S. Ct. 409, 31 L. Ed. 347 (1888); [Graber v. Mayem](#), 426 F.2d 789 (9th Cir. 1970); [Stinson v. Adams](#), 376 So. 2d 1108 (Ala. Civ. App. 1979); [Fillegar v. Walker](#), 54 Ohio App. 262, 7 Ohio Op. 416, 23 Ohio L. Abs. 20, 6 N.E.2d 1010 (1st Dist. Hamilton County 1936).
As to opinions as basis for action for misrepresentation, generally, see § 65.
- 6 [Florek v. Thomas](#), 12 Ohio Op. 3d 70 (Mun. Ct. 1979).
- 7 [Bhandari v. Ismael Leyva Architects, P.C.](#), 84 A.D.3d 607, 923 N.Y.S.2d 484 (1st Dep't 2011).
- 8 [Brodsky v. Hull](#), 196 Md. 509, 77 A.2d 156 (1950); [Jeffreys v. Weekly](#), 81 Or. 140, 158 P. 522 (1916); [Weinstein v. Sprecher](#), 2 Wash. App. 325, 467 P.2d 890 (Div. 1 1970).
- 9 [Boddy v. Henry](#), 113 Iowa 462, 85 N.W. 771 (1901); [Jeffreys v. Weekly](#), 81 Or. 140, 158 P. 522 (1916).

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c. Quantity; Acreage

§ 163. Exchanges

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West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

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[Tort liability for damages for misrepresentations as to area of real property sold or exchanged, 54 A.L.R.2d 660](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 193 to 196 \(Fraud in exchange transactions\)](#)

In exchange transactions, false representations as to the quantity of the property offered in exchange may be the basis of a charge of fraud.¹ If the various elements of a cause of action for fraud and deceit are established, a party to a contract for the exchange of lands may be held liable in tort for misrepresentation by the party or the party's agent in overstating the area of the land exchanged.²

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Footnotes

- 1 [Williams v. Hume](#), 83 Ind. App. 608, 149 N.E. 355 (1925); [Jacks v. Manning](#), 297 S.W. 588 (Tex. Civ. App. Austin 1927).
Statements made by one of the parties in a cattle trade as to the number of head of cattle, which are nothing more than a guess or estimate and must have been so regarded by the other party, do not form the basis of any assertion of fraud. [Sorrells v. Clifford](#), 23 Ariz. 448, 204 P. 1013 (1922).
- 2 [Summers v. Martin](#), 77 Idaho 469, 295 P.2d 265 (1956); [Jacks v. Manning](#), 297 S.W. 588 (Tex. Civ. App. Austin 1927); [Black v. Thompson](#), 110 Wash. 379, 188 P. 393 (1920).

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G. Representations and Statements as to Particular Matters

3. Value, Cost, and Income of Property

a. Value

§ 170. General rule of nonliability

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 136](#) (Complaint, petition, or declaration—For damages—Purchase of stock induced by misrepresentations as to character, extent, and value of property owned by corporation)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 138](#) (Complaint, petition, or declaration—For rescission—Purchase of stock induced by representations that company owned valuable patent—Product not patentable)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 219](#) (Instruction to jury—Expression of opinion not a representation—Opinion as to value)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 220](#) (Instruction to jury—No right to rely on opinion as to value of property)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 221](#) (Instruction to jury—Commendatory trade talk as mere expressions of opinion)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 222](#) (Instruction to jury—Expressions of opinion or affirmations of fact—Statements by one having expert knowledge)

As a general rule, statements as to the value of property, though false, are neither grounds for affirmative relief nor good as a defense.¹ Although there are exceptions,² representations of value made by a person dealing with property are ordinarily

to be regarded only as mere expressions of opinion or commendatory trade statements, and when such is the case, do not constitute fraud or the basis thereof,³ at least in the absence of a confidential relationship.⁴ The same characterization resulting in nonliability is ordinarily accorded to representations that property is worth a certain sum⁵ or as to the amount for which it may be sold.⁶ Thus, it is generally held that a false statement by the vendor of land as to its value cannot form the basis of a charge of fraud.⁷ Likewise, as a general rule, a false affirmation of value by a seller of personalty cannot be made the basis of a charge of fraud, as it is the buyer's own folly to credit an assertion of that nature.⁸

There is authority to the effect that where a representation is that the property is worth a certain sum, the suit is not maintainable notwithstanding that the representee avers and offers to prove that the representor does not in fact entertain that opinion of the value and expresses it with intent to deceive.⁹ On the other hand, it is held that such representations are actionable when known to the speaker to be untrue, if made with the intention of misleading the representee and if the representee does in fact rely on them and is misled, to the representee's injury.¹⁰

Whether a misrepresentation as to value is merely an expression of opinion, or an affirmation of fact or intentional representation to be relied upon, is generally regarded as a question of fact to be determined by the trier of facts.¹¹

Observation:

The general rule that fraud cannot be predicated on representations as to value is based on the fact that value is largely a matter of judgment and estimation, about which people may differ,¹² and it is therefore unlikely that any statement as to value was material in the sense that it was an inducing cause of a transaction.¹³ Such representations can rarely have induced a party to enter into a contract without negligence on that party's part.¹⁴

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Footnotes

- 1 [Lehigh Zinc & Iron Co. v. Bamford](#), 150 U.S. 665, 14 S. Ct. 219, 37 L. Ed. 1215 (1893) (holding that a general assertion that property is valuable, although untrue, is not deceit); [Herrill v. Rugg](#), 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931).
 - 2 [§ 171](#).
 - 3 [Southern Development Co. of Nevada v. Silva](#), 125 U.S. 247, 8 S. Ct. 881, 31 L. Ed. 678 (1888); [Shepherd v. Woodson](#), 328 S.W.2d 1 (Mo. 1959); [Transport Ins. Co. v. Faircloth](#), 898 S.W.2d 269 (Tex. 1995); [Tetreault v. Campbell](#), 115 Vt. 369, 61 A.2d 591 (1948); [Hood v. Cline](#), 35 Wash. 2d 192, 212 P.2d 110 (1949).
 - 4 [§ 171](#).
 - 5 [Herrill v. Rugg](#), 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931).
 - 6 [Baxter v. Davis](#), 252 Ky. 525, 67 S.W.2d 678 (1934).
 - 7 [Page Inv. Co. v. Staley](#), 105 Ariz. 562, 468 P.2d 589 (1970); [Henning v. Kyle](#), 190 Va. 247, 56 S.E.2d 67 (1949).
- As to representations of market value or market price, see [§ 172](#).

- 8 Stumpf v. Lawrence, 4 Cal. App. 2d 373, 40 P.2d 920 (3d Dist. 1935); Zeiting v. Steinberg, 277 S.W. 953 (Mo. Ct. App. 1925); Rothermel v. Phillips, 292 Pa. 371, 141 A. 241, 61 A.L.R. 489 (1928).
- 9 Baxter v. Davis, 252 Ky. 525, 67 S.W.2d 678 (1934).
- 10 Rothermel v. Phillips, 292 Pa. 371, 141 A. 241, 61 A.L.R. 489 (1928).
- 11 Vah Dah Dunshee v. Boadway, 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932); Fourth Nat. Bank v. Webb, 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930).
- 12 Southern Development Co. of Nevada v. Silva, 125 U.S. 247, 8 S. Ct. 881, 31 L. Ed. 678 (1888); Herrill v. Rugg, 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931); Burke v. King, 1936 OK 263, 176 Okla. 625, 56 P.2d 1185 (1936).
- 13 Gordon v. Butler, 105 U.S. 553, 26 L. Ed. 1166, 1881 WL 19779 (1881); Herrill v. Rugg, 114 Cal. App. 492, 300 P. 140 (1st Dist. 1931); Burke v. King, 1936 OK 263, 176 Okla. 625, 56 P.2d 1185 (1936).
- 14 Lynch v. Dunn's Adm'r, 208 Ky. 15, 270 S.W. 468 (1925); Burke v. King, 1936 OK 263, 176 Okla. 625, 56 P.2d 1185 (1936).

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3. Value, Cost, and Income of Property

a. Value

§ 171. Exceptions to general rule

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[Real-estate broker's or agent's misrepresentation to, or failure to inform, vendor regarding value of vendor's real property, 33 A.L.R.4th 944](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 30](#) (Complaint, petition, or declaration—Rendition of services fraudulently induced—Misrepresentation as to value of stock agreed to be taken in payment of services)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 114](#) (Complaint, petition, or declaration—Misrepresentations as to value of patent)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 186](#) (Complaint, petition, or declaration—For rescission—Collusion between vendee and vendor's agent to defraud vendor—Misrepresentation of true value of land)

There are many exceptions to the general rule that statements of value are not a sufficient basis for a charge of fraud, such exceptions arising out of the special circumstances under which the representations are made.¹ It cannot be laid down as a matter of law that value is never a material fact.² For example, the general rule that such statements are not actionable applies only where the parties stand on an equal footing and have equal means of knowledge, with no relation of trust or confidence existing between them.³ Likewise, a statement of value may be of such a character, so made and intended, and so received, as to constitute fundamental misrepresentation,⁴ and if it is made as an assertion of fact, and with the purpose that it shall be so received, and it is so received, it may amount to a fraud.⁵ Moreover, a statement of value involving and coupled with a statement of a material fact is fraud.⁶

The general rule that assertions of value are not actionable does not apply where the representation comes from a third person not known to have any interest in magnifying the value of the property. Thus, where the value of certain property is stated by one who apparently has no object to gain, and no motive or intention to depart from the truth, and who thus throws the representee off guard, and exposes the representee to being misled, the speaker is liable in damages for the false statement.⁷

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Footnotes

- 1 [Kabatchnick v. Hanover-Elm Bldg. Corp.](#), 328 Mass. 341, 103 N.E.2d 692, 30 A.L.R.2d 918 (1952); [Shepherd v. Woodson](#), 328 S.W.2d 1 (Mo. 1959).
- 2 [Vah Dah Dunshee v. Boadway](#), 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932); [Gould v. James](#), 43 Wyo. 161, 299 P. 275 (1931).
A complaint by first-time home buyers, stating that an appraisal for property one home buyer had purchased contained "several misrepresentations concerning the condition and qualities of the home, including, but not limited to: who owned the property, whether the property had municipal water, the type of basement and the status of repairs on the home," stated a cause of action for fraud against the appraisers as to such home buyer, since the buyer had sufficiently pleaded the elements of material misrepresentation of fact, scienter, justifiable reliance, and damages. [Flandera v. AFA America, Inc.](#), 78 A.D.3d 1639, 913 N.Y.S.2d 441 (4th Dep't 2010).
- 3 [Hiltbold v. Stern](#), 82 A.2d 123, 26 A.L.R.2d 852 (Mun. Ct. App. D.C. 1951); [Shepherd v. Woodson](#), 328 S.W.2d 1 (Mo. 1959).
The trial court's conclusion that a developer constructively defrauded subdivision lot purchasers when its builders represented that future homes in the subdivision would be of a size and value comparable to theirs was supported by the factual findings, including that the builders failed to advise residents of the actual minimum requirements of the subdivision's architectural standards or that the developer could change the standards at will, that there was a special relationship among the parties by virtue of the subdivision declaration, that the purchasers relied on the builders' representations when deciding to construct their homes on the lots, that their homes had a lesser value than they would have had if located amongst comparable homes, and that the purchasers' homes enhanced the developer's marketing of the remainder of the community as it was completed. [Yeager v. McManama](#), 874 N.E.2d 629 (Ind. Ct. App. 2007).
- 4 [Sunderhaus v. Perel & Lowenstein](#), 215 Tenn. 619, 388 S.W.2d 140 (1965); [Tetreault v. Campbell](#), 115 Vt. 369, 61 A.2d 591 (1948).
- 5 [Hiltbold v. Stern](#), 82 A.2d 123, 26 A.L.R.2d 852 (Mun. Ct. App. D.C. 1951); [Collier v. Nolan](#), 125 Vt. 82, 211 A.2d 265 (1965).
- 6 [Alio v. Saponaro](#), 133 A.D.2d 887, 520 N.Y.S.2d 245 (3d Dep't 1987); [Sunderhaus v. Perel & Lowenstein](#), 215 Tenn. 619, 388 S.W.2d 140 (1965).
- 7 [Samp v. Long](#), 50 S.D. 492, 210 N.W. 733 (1926).

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37 Am. Jur. 2d Fraud and Deceit § 172

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a. Value

§ 172. Market value or market price

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , [27](#), [28](#)

While different conclusions have been reached under varying fact situations, most of the courts support the proposition that representations of market price or market value are not necessarily mere representations of opinion, but are, or at least under some circumstances may be, representations of fact on which fraud may be predicated.¹ For instance, a representation that a certain kind of property, constantly sold, has a market at certain figures and that it readily sells at those figures, is not a statement of opinion, but one of fact, upon which fraud may be predicated.² Under this view, although intrinsic value may be the subject of opinion only, a statement as to the market value of a stock which has an ascertainable market value is a statement of a fact and not the mere expression of an opinion.³ Also, a complaint by vendors that their real estate brokers misrepresented to them the market value of their home, the lowest price at which their home would sell, and the length of time needed to sell the home, states a cause of action for fraud where the brokers' representations can be found to have been meant by the parties to be understood as statements of fact to be relied upon rather than as expressions of mere opinion to be accepted solely as such.⁴ Likewise, evidence supports a jury verdict in favor of a trust that invested in a cattle-raising venture and against the providers of feedlot services who induced the trust to make the investment where the feedlot providers misrepresented the market value and profitability of the cattle under the plan, including a claim that the cattle would sell for a certain price as of a certain futures-trading date, resulting in an operating loss and lost profits to the trust.⁵

Some cases, however, support the doctrine that representations as to market price or market value of stock or of other property, where the truth is readily obtainable by both parties, are ordinarily representations of opinion merely, which will not constitute a basis for fraud.⁶ Accordingly, a representation of the market value of a commodity is merely an opinion that cannot be made the basis of a recovery for fraud and deceit in the absence of a confidential relationship between the parties.⁷ The doctrine that

representations as to the market value of an article or commodity are mere expressions of opinion, and not statements of fact, is limited in its operation to familiar articles and commodities of commerce whose market value is easily ascertainable and does not apply to sales of articles or commodities whose market value is difficult of determination, especially when such articles or commodities are offered for sale by a vendor who is familiar with their true worth and real market value, to the vendee, who is entirely ignorant thereof, and who buys in reliance on the vendor's positive statements concerning the market value.⁸

Fraud may be predicated on false representations of market value and may constitute a defense to an action for the purchase price of property so misrepresented⁹ or a defense to an action on notes given for the purchase price.¹⁰ In some instances, however, such statements have been held to be opinionative and not sufficient to form the basis for a defense on the ground of fraud.¹¹

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Footnotes

- 1 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930) (market value of corporate stock); [Sunderhaus v. Perel & Lowenstein](#), 215 Tenn. 619, 388 S.W.2d 140 (1965); [Gray v. Wikstrom Motors](#), 14 Wash. 2d 448, 128 P.2d 490 (1942).
- 2 [Gray v. Wikstrom Motors](#), 14 Wash. 2d 448, 128 P.2d 490 (1942) (standard selling price of a certain model of car).
- 3 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930).
- 4 [Duhl v. Nash Realty Inc.](#), 102 Ill. App. 3d 483, 57 Ill. Dec. 904, 429 N.E.2d 1267, 33 A.L.R.4th 928 (1st Dist. 1981).
- 5 [Hedley Feedlot, Inc. v. Weatherly Trust](#), 855 S.W.2d 826 (Tex. App. Amarillo 1993), writ denied, (Feb. 2, 1994).
- 6 [Lilienthal v. Suffolk Brewing Co.](#), 154 Mass. 185, 28 N.E. 151 (1891) (market value of hops).
- 7 [Fossier v. Morgan](#), 474 S.W.2d 801 (Tex. Civ. App. Houston 1st Dist. 1971).
- 8 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930); [Griesa v. Thomas](#), 99 Kan. 335, 161 P. 670 (1916).
- 9 [Hetland v. Bilstad](#), 140 Iowa 411, 118 N.W. 422 (1908).
- 10 [Fourth Nat. Bank v. Webb](#), 131 Kan. 167, 290 P. 1, 71 A.L.R. 619 (1930).
- 11 [Kincaid v. Price](#), 82 Ark. 20, 100 S.W. 76 (1907) (land); [Lilienthal v. Suffolk Brewing Co.](#), 154 Mass. 185, 28 N.E. 151 (1891) (notes).

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a. Value

§ 173. Representations by purchaser

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

As a general rule, in the absence of special circumstances that make it incumbent upon a purchaser to speak the truth and to disclose facts in the purchaser's own knowledge and unknown to the vendor, statements which the purchaser makes during the negotiations as to the value of the land cannot ordinarily be made the basis of a charge of fraud.¹ A vendor should know or ascertain the value of the vendor's own property, and if the vendor is so indiscreet as to place reliance upon the statement of a prospective purchaser, without finding out the truth personally, the vendor should be left to make the best of a bad bargain.² However, the fact that the purchaser has special information regarding facts enhancing the ordinary value of land places the purchaser under a legal obligation to do no act or make any representation calculated to mislead the owner into the belief that there was no special condition affecting the value.³

In the absence of waiver or estoppel, a vendor or seller who has been induced by false representations of a vendee or buyer to grant or sell the property on terms less favorable than the vendor would otherwise have demanded may maintain an action sounding in tort against such vendee or buyer for the damages resulting from such fraud.⁴ In many of the cases, the vendee or buyer, by reason of confidential relationships or otherwise, has had greater knowledge than the vendor or seller of the value of the property in the purchase of which the fraud and deceit were committed.⁵ In other cases in which such statements have been held actionable as fraud, however, there was no such confidential relationship.⁶

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Footnotes

- 1 [James v. Anderson](#), 149 Va. 113, 140 S.E. 264, 56 A.L.R. 421 (1927).
- 2 [Stuart v. Dorow](#), 216 Mich. 591, 185 N.W. 662 (1921).
- 3 [Crompton v. Beedle](#), 83 Vt. 287, 75 A. 331 (1910).
- 4 [Cheraska v. Ohanasian](#), 259 Mass. 341, 156 N.E. 715, 52 A.L.R. 1149 (1927).
- 5 [McDonough v. Williams](#), 77 Ark. 261, 92 S.W. 783 (1905).
- 6 [Simon v. Goodyear Metallic Rubber Shoe Co.](#), 105 F. 573 (C.C.A. 6th Cir. 1900) (person induced to make hard contract, by false representations that a competing seller of the commodity had gone out of business); [Cheraska v. Ohanasian](#), 259 Mass. 341, 156 N.E. 715, 52 A.L.R. 1149 (1927) (vendor induced to sell for lower price by false representation that no broker had been involved in transaction, when in fact a broker had been sufficiently involved to render the vendor liable for brokerage commissions).

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§ 174. Exchange transactions

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

As a general rule, representations as to the value of properties involved in exchange transactions are ordinarily considered as mere expressions of opinion, or commendatory trade statements, and as such, do not constitute fraud or the basis thereof.¹ Where the parties to an exchange contract stand upon an equal footing, expressions of opinion as to the value of certain property will not usually be considered so material that misstatements will constitute fraud.² There are, however, circumstances under which representations as to value in exchange transactions are actionable.³ Thus, misrepresentations as to value in exchange transactions are fraudulent where the other party has not equal means of knowing the true value,⁴ where the other party is fraudulently induced to forbear making an examination or inquiry,⁵ or where there is a relation of trust and confidence between the parties.⁶ Also, false representations as to specific extrinsic matters which, if true, materially affect the value of the property which is the subject of an exchange are usually regarded by the courts as representations of fact, on which a charge of fraud may be based.⁷

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Footnotes

- ¹ [Batchelor v. Batchelor](#), 502 So. 2d 751 (Ala. 1987).
- ² [White v. Oregon Realty Exch. Inv. Co.](#), 114 Or. 636, 236 P. 269 (1925).
- ³ [Burgdorfer v. Thielemann](#), 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936); [Gould v. James](#), 43 Wyo. 161, 299 P. 275 (1931).

- 4 Vah Dah Dunshee v. Boadway, 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932); Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936).
- 5 Burgdorfer v. Thielemann, 153 Or. 354, 55 P.2d 1122, 104 A.L.R. 1407 (1936); Gould v. James, 43 Wyo. 161, 299 P. 275 (1931).
- 6 Vah Dah Dunshee v. Boadway, 119 Cal. App. 678, 7 P.2d 325 (3d Dist. 1932).
- 7 Stumpf v. Lawrence, 4 Cal. App. 2d 373, 40 P.2d 920 (3d Dist. 1935); Pustelniak v. Vilimas, 352 Ill. 270, 185 N.E. 611 (1933).

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b. Cost or Price Paid, Offers, Etc.

§ 175. Generally

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

As a general rule, false statements by one disposing of property commercially to a person negotiating for its acquisition, with reference to the cost thereof, are sufficient to authorize or sustain a charge of fraud if the statements are made to influence the transaction relating to the property and are relied upon by the representee to the representee's injury.¹ A vendor or the vendor's agent, dealing at arm's length with a purchaser, is guilty of fraud entitling the purchaser to relief where such vendor or agent misrepresents the price paid for the property, or the price someone else paid for it, and that statement is relied upon by the purchaser to the purchaser's detriment.² This rule has also been applied to such misrepresentations by one exchanging property.³

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Footnotes

- 1 [Essenburg v. Russell](#), 346 Mich. 319, 78 N.W.2d 136 (1956).
- 2 [Dunlap v. Peirce](#), 336 Ill. 178, 168 N.E. 277, 66 A.L.R. 181 (1929).
- 3 [Fenwick v. Sullivan](#), 102 Vt. 28, 145 A. 258 (1929).

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§ 176. Effect of special circumstances

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

Even in jurisdictions in which a mere misrepresentation as to the cost of property does not of itself constitute actionable deceit, there may exist circumstances that in connection with the misrepresentation will constitute grounds for actionable deceit, such as where the parties do not stand on an equal footing,¹ where confidential relationships exist,² or where the representations amount to dishonest estimates, as where an architect deliberately misrepresents the cost of a building which is to be constructed.³ Moreover, whatever conflict there may be as to the fraudulent character of representations of cost generally, the courts sustain the doctrine that where, by the agreement, the cost to the transactor disposing of the subject matter thereof is taken as the criterion by which the instant price is to be determined, statements as to the cost are material and essential elements of the contract, and any misrepresentation or fraudulent practices with reference thereto, if relied upon by the representee, constitute actionable fraud,⁴ whether the price to be paid by the representee is based on the price paid by the disposing owner⁵ or by others,⁶ and especially where the parties contemplate future business relations to grow out of the sale.⁷

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Footnotes

- 1 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905).
- 2 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905).
- 3 [Lane v. Inhabitants of Town of Harmony](#), 112 Me. 25, 90 A. 546 (1914).
- 4 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905); [Bergeron v. Miles](#), 88 Wis. 397, 60 N.W. 783 (1894).

"Invoice value" has a definite meaning, and a false statement as to it may be actionable where it was determinative of the price paid by the buyer. [Knopfler v. Flynn](#), 135 Minn. 333, 160 N.W. 860 (1917).

5 [Fellows v. Sapp](#), 45 Ga. App. 89, 163 S.E. 314 (1932); [Knopfler v. Flynn](#), 135 Minn. 333, 160 N.W. 860 (1917); [McBee v. Deussenberry](#), 99 W. Va. 176, 128 S.E. 378 (1925).

6 [Beare v. Wright](#), 14 N.D. 26, 103 N.W. 632 (1905).

7 [Kohl v. Taylor](#), 62 Wash. 678, 114 P. 874 (1911).

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§ 177. Representations as to price at which property has been sold or offered

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

Misrepresentations by one seeking to dispose of property commercially as to the price for which the property had been sold or offered have frequently been held to be factual and material, and thus to afford a basis for fraud,¹ although the mere statement of an excessive asking price has been held not to constitute fraud.² Similarly, representations that bonds are selling at par, that there has not been a sale of them for less than a certain figure, and that the seller has borrowed a certain amount from the bank on the bonds, are representations of fact and, if false and made with intent to deceive, will sustain an action for damages for the fraud.³

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Footnotes

- ¹ [Dunlap v. Peirce](#), 336 Ill. 178, 168 N.E. 277, 66 A.L.R. 181 (1929).
- ² [MacKellar v. Thompson](#), 119 A.D. 36, 103 N.Y.S. 853 (2d Dep't 1907).
- ³ [Adams v. Collins](#), 196 Mass. 422, 82 N.E. 498 (1907).

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§ 178. Representations as to other offers

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

A.L.R. Library

[Misrepresentation by lessor, in negotiations for lease, as to offers of rental received from third persons, as actionable fraud, 30 A.L.R.2d 923](#)

A cause of action for fraud or deceit is recognized when a person falsely represents to another in a sales transaction that the person has been offered more for the property in another offer and the prospective purchaser relies on the misrepresentation.¹ It has been said that the courts must decide on a case by case basis what is actionable as fraud in a case in which a prospective purchaser alleges that the vendor has falsely represented that an offer has been made by a second prospective purchaser which the vendor will accept if the first prospective purchaser does not agree to the asking price and that liability is made to depend on the degree of thoroughness to which fraud is perpetrated.²

Some courts have held, however, that the general rule applicable to representations as to value applies, and that a misrepresentation that a certain sum has been bid by another for the property does not constitute actionable fraud.³ Additionally, a party cannot recover on a claim of fraudulent inducement or misrepresentation based on any alleged statements to the effect that a company's offer is a final, best, or nonnegotiable offer.⁴

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Footnotes

- 1 [Kabatchnick v. Hanover-Elm Bldg. Corp.](#), 328 Mass. 341, 103 N.E.2d 692, 30 A.L.R.2d 918 (1952); [Elias v. Handler](#), 155 A.D.2d 583, 548 N.Y.S.2d 33 (2d Dep't 1989) (rescission of sale).
- 2 [Ravosa v. Zais](#), 40 Mass. App. Ct. 47, 661 N.E.2d 111 (1996).
- 3 [Ripy v. Cronan](#), 131 Ky. 631, 115 S.W. 791 (1909); [Shikes v. Gabelnick](#), 273 Mass. 201, 173 N.E. 495, 87 A.L.R. 1339 (1930) (prospective contract of exchange).
- 4 [Marburger v. Seminole Pipeline Co.](#), 957 S.W.2d 82 (Tex. App. Houston 14th Dist. 1997) (disapproved of on other grounds by, [Hubenak v. San Jacinto Gas Transmission Co.](#), 141 S.W.3d 172 (Tex. 2004)).

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§ 179. Sale price of other property in neighborhood

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

As a general rule, false statements made by an owner or the owner's agent in connection with a transaction concerning real property, as to the price for which other property in the neighborhood has sold, where made as a statement of fact and justly relied upon by the representee to the representee's injury, constitute misrepresentation of a material fact, amounting to fraud, which entitles the representee to appropriate relief.¹ This rule has been applied to such false statements made by a vendor or the vendor's agent,² and by an exchanger of property.³ Statements concerning the sale price of other land in a neighborhood, however, may be made in such a manner and under such conditions as to amount only to the expression of an opinion, and such statements by one engaged in acquiring real estate have been regarded as nonactionable "sales talk."⁴

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Footnotes

- 1 [Winkler v. Jerrue](#), 20 Cal. App. 555, 129 P. 804 (2d Dist. 1912); [Brody v. Foster](#), 134 Minn. 91, 158 N.W. 824 (1916).
- 2 [Winkler v. Jerrue](#), 20 Cal. App. 555, 129 P. 804 (2d Dist. 1912).
- 3 [Oulton v. McManus](#), 173 N.W. 14 (Iowa 1919); [Brody v. Foster](#), 134 Minn. 91, 158 N.W. 824 (1916).
- 4 [Glass v. City of Binghamton](#), 6 A.D.2d 944, 176 N.Y.S.2d 18 (3d Dep't 1958).

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c. Income, Profits, or Rental Productivity

§ 180. Generally

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West's Key Number Digest, [Fraud](#) , 27, 28

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 115](#) (Complaint, petition, or declaration—For damages—Fraud in sale of business—Misrepresentation as to past profits)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 116](#) (Complaint, petition, or declaration—For rescission—Fraud in sale of business combined with lease of business—Misrepresentation as to past profits and value of business inventory)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 117](#) (Complaint, petition, or declaration—For rescission—Fraud in sale of dry cleaning business—Misrepresentation as to income, expenses, and lack of competing business)

Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 174, 177, 178 (Complaint, petition, or declaration for fraud in sale of land by representations as to rental income)

A false representation as to past or present rents, profits, or income has often been held to constitute a sufficient basis for an action for damages or rescission on the ground of fraud.¹ Thus, a false representation by an owner of land, or the owner's agent, seeking to dispose of the property commercially, as to the present or past income,² profits, or produce³ thereof, or as to the amount of rent received therefor,⁴ is regarded as a statement of fact upon which fraud may be predicated if it is false since these are matters within the representor's own knowledge. The same is true of a false assertion that the profits of a business are or have been a certain sum annually,⁵ or a false statement as to what a business now earns⁶ or its gross receipts.⁷ Thus, false representations concerning the past "volume of business" or "gross income from sales" or gross rents may constitute fraud.⁸

While in most instances a statement as to the amount of past or present rents, profits, or income, made in the form of a statement of fact, is treated as one of fact and not of opinion,⁹ where a statement concerning rents, profits, or income is understood to be merely an estimate or opinion, the courts will treat it as such even though the substance of the statement could have been embodied in a statement of fact,¹⁰ particularly where a buyer rushes into the sales transaction without insisting upon or awaiting receipt of any more definitive financial information.¹¹ However, a vague statement that a property or business is "profitable," or a "money-maker," or the like, may sometimes be treated as one of fact.¹²

In cases involving false representations as to rents, profits, or income, the question whether there is actionable fraud is determined with respect to the intelligence and experience of the victim of the fraud, rather than by what the effect would have been on the average person.¹³ This is a test that works both ways. For example, if the person complaining of fraud is one who has great experience in the field of business in which the transaction occurred, the court may find that the person was not in fact deceived by the false statement but decided to enter into the contract because the person believed that the consideration was proper even though the income, rents, or profits were less than represented, but the average person would have had a cause of action for fraud.¹⁴

Fraud may sometimes consist of understating, rather than overstating, income, rents, or profits, as where the representor is required to make a payment in proportion to the amount of the representor's income, rents, or profits, and the representor understates them to cut down the amount of his or her payment.¹⁵

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Footnotes

- 1 [Hegg v. Dickens](#), 270 Ark. 641, 606 S.W.2d 106 (Ct. App. 1980); [Head v. Benjamin Rich Realty Co.](#), 55 Mich. App. 348, 222 N.W.2d 237 (1974); [Hampton v. Sabin](#), 49 Or. App. 1041, 621 P.2d 1202 (1980).
In exchange transactions, fraud may be predicated on false representations concerning the past or present income, rentals, or profits of the property exchanged. [Pustelniak v. Vilimas](#), 352 Ill. 270, 185 N.E. 611 (1933); [Rudnick v. Rudnick](#), 281 Mass. 205, 183 N.E. 348 (1932).
- 2 [Hegg v. Dickens](#), 270 Ark. 641, 606 S.W.2d 106 (Ct. App. 1980); [Saba v. Miller](#), 327 Mich. 363, 41 N.W.2d 894 (1950); [Bertram v. Kempster](#), 216 S.W.2d 494 (Mo. 1949).
- 3 [Miller v. Porter](#), 218 Ark. 841, 238 S.W.2d 940 (1951); [Eck v. McMichael](#), 176 Cal. App. 2d 368, 1 Cal. Rptr. 369 (4th Dist. 1959).

- 4 Kackley v. Webber, 310 Ky. 285, 220 S.W.2d 587, 9 A.L.R.2d 500 (1949); Kabatchnick v. Hanover-Elm
Bldg. Corp., 328 Mass. 341, 103 N.E.2d 692, 30 A.L.R.2d 918 (1952).
An investigation is not necessary where a specific false statement as to rents is reasonably relied upon and
knowingly made. Upledger v. Vilanor Inc., 369 So. 2d 427 (Fla. 2d DCA 1979).
- 5 Hegg v. Dickens, 270 Ark. 641, 606 S.W.2d 106 (Ct. App. 1980); Furtado v. Gemmell, 242 Or. 177, 408
P.2d 733 (1965).
- 6 Miller v. Porter, 218 Ark. 841, 238 S.W.2d 940 (1951); Hawthorn-Mellody, Inc. v. Driessen, 213 Kan. 791,
518 P.2d 446 (1974).
- 7 Miller v. Porter, 218 Ark. 841, 238 S.W.2d 940 (1951) (dairy herd).
- 8 Automobile Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co., 168 F.2d 381 (C.C.A.
10th Cir. 1948); Horner v. Wagy, 173 Or. 441, 146 P.2d 92 (1944).
- 9 Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950).
- 10 Carlson v. Brickman, 110 Cal. App. 2d 237, 242 P.2d 94 (1st Dist. 1952); Miller v. Protrka, 193 Or. 585,
238 P.2d 753 (1951).
- 11 In re Wright, 223 B.R. 886 (Bankr. E.D. Pa. 1998) (applying Pennsylvania law).
- 12 Spiess v. Brandt, 230 Minn. 246, 41 N.W.2d 561, 27 A.L.R.2d 1 (1950).
- 13 Hefferan v. Freebairn, 34 Cal. 2d 715, 214 P.2d 386 (1950); Bertram v. Kempster, 216 S.W.2d 494 (Mo.
1949).
- 14 King v. Miller, 97 Cal. App. 2d 702, 218 P.2d 554 (1st Dist. 1950); Fote v. Reitano, 46 So. 2d 891 (Fla. 1950).
- 15 Automobile Ins. Co. of Hartford, Conn. v. Barnes-Manley Wet Wash Laundry Co., 168 F.2d 381 (C.C.A.
10th Cir. 1948); Gregory v. Chemical Waste Management, Inc., 38 F. Supp. 2d 598 (W.D. Tenn. 1996)
(applying Alabama law).

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37 Am. Jur. 2d Fraud and Deceit § 181

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IV. False Representations

G. Representations and Statements as to Particular Matters

3. Value, Cost, and Income of Property

c. Income, Profits, or Rental Productivity

§ 181. As to future income, profits, rents, etc

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#) , 27, 28

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Predictions of future profits are not ordinarily fraudulent where the parties deal at arm's length.¹ A statement concerning future profits, income, or rents is generally a mere prediction or "opinion" and not a statement of fact, and cannot constitute actionable fraud.² Where a statement concerning future profits is justified by past experience and present knowledge, it is not fraudulent,³ and the mere fact that a promise or prediction concerning future rents, profits, or income was not fulfilled does not establish a liability for fraud.⁴

Statements that "business is good" and the "plaintiff will get rich," that "business is excellent and the plaintiff should buy it," that it is "a gold mine," and that a third party is going to buy the business are not factual and do not relate to past or existing fact and can not form the basis of an action in fraud.⁵

On the other hand, false representations of future profits of a business may be so gross as to constitute fraud, especially where the representor is experienced and has superior knowledge of the business and the representee is inexperienced and ignorant

of the facts and prospects respecting such business.⁶ Moreover, misrepresentation as to the profits that may be derived from a business will amount to a misstatement of fact if the person making it has no reasonable grounds on which to base it and has no honest belief in its truth but makes the statement merely for the purpose of misleading and defrauding the other party as where a business sold is being conducted at a loss, and the positive assertion is made by the seller to the purchaser, to induce the purchase, that the latter will receive large profits therefrom.⁷

Where one states that the future profits or income should be a certain sum, but the person actually believes that there will be no profits or income or that they will be substantially less than the person represents, the statement constitutes actionable fraud where the hearer believes the representor and relies on the statement to his or her injury.⁸ The rule that a false promise may be the basis of actionable fraud where at the time it was made the promisor did not intend to perform it⁹ has been applied where the promise was as to rents, profits, or income¹⁰ although in some cases, it has been held that a promise to guarantee a certain future income is not actionable fraud even though the defendant intended not to perform the promise when the defendant made it.¹¹

Where the subject of the sale is a new business so that there are few existing facts concerning its profits or prospects, the future is unusually speculative, and it may be held that representations concerning future profits involve too much guesswork to constitute actionable fraud.¹² Even where the structure or business is well established, but a variety of factors that the owner cannot control seems likely to affect future profits or income, the courts may well hold that a false statement concerning future profits or income does not constitute fraud.¹³

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Footnotes

- 1 Pustelniak v. Vilimas, 352 Ill. 270, 185 N.E. 611 (1933).
- 2 Fischer v. Division West Chinchilla Ranch, 310 F. Supp. 424 (D. Minn. 1970); Stumpf v. Lawrence, 4 Cal. App. 2d 373, 40 P.2d 920 (3d Dist. 1935); Canterbury Court, Inc. v. Rosenberg, 224 Kan. 493, 582 P.2d 261 (1978); Beierle v. Taylor, 164 Mont. 436, 524 P.2d 783 (1974); Guadalupe-Blanco River Authority v. City of San Antonio, 145 Tex. 611, 200 S.W.2d 989 (1947).
- 3 Donnelly v. Baltimore Trust & Guarantee Co., 102 Md. 1, 61 A. 301 (1905).
- 4 Rogers v. Sinclair Refining Co., 49 Ga. App. 72, 174 S.E. 207 (1934).
- 5 Davidowitz v. Dixie Associates, 76 Misc. 2d 554, 351 N.Y.S.2d 34 (Sup 1973), judgment modified on other grounds, 44 A.D.2d 535, 353 N.Y.S.2d 447 (1st Dep't 1974).
Where a vendor's assertion that a campsite operation was a "gold mine" merely constituted "dealer's talk" and where the vendor's statement that gross revenues from the campground in a certain summer season had amounted to \$1,500 was not false, a jury properly returned a verdict for the vendors for overdue installments on the purchase price and against the vendees on a counterclaim for recession of the sale, notwithstanding the vendees only grossed \$400 for the summer following the purchase of the property. *Eaton v. Sontag*, 387 A.2d 33 (Me. 1978).
- 6 Wilke v. Coinway, Inc., 257 Cal. App. 2d 126, 64 Cal. Rptr. 845 (1st Dist. 1967); Hollerman v. F. H. Peavey & Co., 269 Minn. 221, 130 N.W.2d 534 (1964); Bails v. Wheeler, 171 Mont. 524, 559 P.2d 1180 (1977).
- 7 Luchow v. Kansas City Breweries Co., 183 S.W. 1123 (Mo. Ct. App. 1916); Starnes v. Motsinger, 278 S.W. 496 (Tex. Civ. App. El Paso 1925) (recognizing rule).
- 8 Dyke v. Zaiser, 80 Cal. App. 2d 639, 182 P.2d 344 (4th Dist. 1947); Russell v. Industrial Transp. Co., 113 Tex. 441, 251 S.W. 1034, 51 A.L.R. 1 (Comm'n App. 1923), *aff'd*, 113 Tex. 441, 258 S.W. 462, 51 A.L.R. 1 (1924).
- 9 §§ 94 to 100.
- 10 Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S.W.2d 1 (1934); Murph v. Foxworth, 93 S.W.2d 817 (Tex. Civ. App. Galveston 1936).
- 11 Hart v. Zaitz, 72 Colo. 315, 211 P. 391 (1922); Shine v. Dodge, 130 Me. 440, 157 A. 318 (1931).

- 12 Coleman v. Dawson, 110 Cal. App. 201, 294 P. 13 (3d Dist. 1930); Detroit & Security Trust Co. v. Echternkamp, 254 Mich. 369, 237 N.W. 52 (1931).
- 13 Moser v. New York Life Ins. Co., 151 F.2d 396 (C.C.A. 9th Cir. 1945); Gibson v. Mendenhall, 1950 OK 276, 203 Okla. 558, 224 P.2d 251 (1950).

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3. Value, Cost, and Income of Property

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§ 182. As to future income, profits, rents, etc—Future dividends

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Forms

[Am. Jur. Pleading and Practice Forms, Corporations § 133](#) (Complaint, petition, or declaration—For damages—Misrepresentations in prospectus—Promoter's guaranty of minimum annual dividend on stock subscription)

Fraud may be predicated on certain representations concerning future dividends.¹ On the other hand, it has been held that a false statement concerning future dividends is a mere prediction or opinion rather than a statement of fact and is not ordinarily actionable.²

While the rule that fraud may consist of a promise made with intent not to perform it has been applied where the defendant promised that certain dividends would be paid in the future,³ promises as to future dividends have also been held to be nonactionable opinions or promises.⁴

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Footnotes

- 1 State Building & Loan Ass'n v. Bradwell, 227 Ala. 606, 151 So. 689 (1933); Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S.W.2d 1 (1934); Seaboard Planning Corp. v. Powell, 364 So. 2d 1091 (Miss. 1978) (guaranteed return of 8% per annum).
- 2 Farmers' Loan & Mortgage Co. v. Langley, 166 La. 251, 117 So. 137 (1928); Howard v. Merrick, 145 Or. 573, 27 P.2d 891 (1933).
- 3 Kentucky Electric Development Co.'s Receiver v. Head, 252 Ky. 656, 68 S.W.2d 1 (1934).
- 4 Steele v. Singletary, 120 S.C. 132, 110 S.E. 833 (1922).

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c. Income, Profits, or Rental Productivity

§ 183. As to future income, profits, rents, etc—"Rental value"

[Topic Summary](#) | [Correlation Table](#) | [References](#)

West's Key Number Digest

West's Key Number Digest, [Fraud](#)  27, 28

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[False representations as to income, profits, or productivity of property as fraud, 27 A.L.R.2d 14](#)

Where a statement as to "rental value" is made and accepted as one of present fact, it will be thus treated in the law,¹ although it has been held that a statement as to how much a purchaser can get as rents for, or the "rental value" of, the property is a statement of opinion which, even though untrue, is not actionable.² Further, purchasers may bring a fraud action where rent concessions are misrepresented.³

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Footnotes

¹ [Cahill v. Readon](#), 85 Colo. 9, 273 P. 653 (1928); [Wilson v. Robinson](#), 21 N.M. 422, 155 P. 732 (1916).

² [Savinovich v. Winbigler](#), 155 Wash. 333, 284 P. 77 (1930).

Statements made by a vendor's agent concerning the future rentals of apartment houses were not misrepresentations where the agents also stated to the vendee that the buildings would be an excellent

investment "if you receive the rents as we contemplate ..." [Pacesetter Homes, Inc. v. Brodtkin](#), 5 Cal. App. 3d 206, 85 Cal. Rptr. 39 (2d Dist. 1970).
3 [Kelley/Lehr & Associates, Inc. v. O'Brien](#), 194 Ill. App. 3d 380, 141 Ill. Dec. 426, 551 N.E.2d 419 (2d Dist. 1990).

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§ 184. Generally

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West's Key Number Digest, [Fraud](#)  27, 28

Financial status is a fact, and a statement as to that status affirms a fact notwithstanding that it represents a conclusion based on the valuation of property.¹ Where one has been induced to enter into an agreement concerning an interest in land by fraudulent misrepresentations as to the financial ability of a party, the circumstances may amount to fraud.² Likewise, where one is given a statement of assets and liabilities as it appears on the books of a business which the person contemplates purchasing, that person has the right to assume, if nothing is said to the contrary, that it is a truthful statement of the affairs of the business and that all the assets and liabilities are on the books and are correctly set forth.³ A seller of a business who tells the buyer that only one or two accounts were leaving or giving notice to leave, when the seller has knowledge to the contrary, can be held liable to the buyer, under the rule that a seller who misrepresents a material fact knowing that it is untrue and that the buyer will rely thereon can be held responsible for the seller's misdeeds.⁴

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- ¹ [Gainesville Nat. Bank v. Bamberger](#), 77 Tex. 48, 13 S.W. 959 (1890).
- ² [Newman v. Newman](#), 103 Ohio St. 230, 103 Ohio St. 267, 133 N.E. 70, 18 A.L.R. 1089 (1921).
- ³ [Foote v. Leary](#), 103 A.D. 547, 93 N.Y.S. 169 (1st Dep't 1905).
- ⁴ [Aleppo Corp. v. Pozin](#), 114 So. 2d 645 (Fla. 3d DCA 1959).

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§ 185. Representations as to one's own financial status

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The rule is well established that false representations, factual in nature and made by a person concerning the person's own credit, solvency, or financial position or ability, constitute the basis for a charge of fraud,¹ at least when they are relied upon by the party or parties to whom they are made.² Such representations constitute a fraud that will either sustain an action of deceit³ or be grounds for rescinding a commercial transaction made in reliance thereon⁴ although more than a mere overestimate of the value of the representor's property by a representor is necessary before the representor can be held guilty of fraud in contracting a debt.⁵

In many cases, false representations by borrowers that are made in financial statements submitted as the basis for loans or extensions of credit constitute actionable fraud.⁶ Actions for fraudulent representations in such financial statements must be predicated upon those representations which are material in nature and form an inducement to the transaction.⁷ Materiality may be a question of law or fact but must embrace a subject relating to the borrower's financial condition that constituted a moving factor resulting in the action of the lender.⁸

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¹ [Monier v. Guaranty Trust Co. of New York](#), 82 F.2d 252, 104 A.L.R. 912 (C.C.A. 2d Cir. 1936); [Manly v. Ohio Shoe Co.](#), 25 F.2d 384, 59 A.L.R. 413 (C.C.A. 4th Cir. 1928); [Bicknell v. Stanley](#), 118 B.R. 652 (S.D. Ind. 1990) (applying Indiana law).

The rule is applicable where the performance of services is secured by the false representation as to financial responsibility. [Hunt v. Lewis](#), 87 Vt. 528, 90 A. 578 (1914).

- 2 Paron Capital Management, LLC v. Crombie, 2012 WL 2045857 (Del. Ch. 2012).
3 Henry v. Dennis, 95 Me. 24, 49 A. 58 (1901).
4 Monier v. Guaranty Trust Co. of New York, 82 F.2d 252, 104 A.L.R. 912 (C.C.A. 2d Cir. 1936); In re
Weissman, 19 F.2d 769, 53 A.L.R. 644 (C.C.A. 2d Cir. 1927); Manly v. Ohio Shoe Co., 25 F.2d 384, 59
A.L.R. 413 (C.C.A. 4th Cir. 1928).
5 South Branch Lumber Co. v. Ott, 142 U.S. 622, 12 S. Ct. 318, 35 L. Ed. 1136 (1892).
6 Hinton v. Equitable Loan Co., 41 Ga. App. 815, 155 S.E. 101 (1930); First State Sav. Bank of Muskegon
Heights v. Dake, 250 Mich. 525, 231 N.W. 135 (1930).
7 Hills Sav. Bank v. Cress, 205 Iowa 306, 218 N.W. 74 (1928).
8 Hills Sav. Bank v. Cress, 205 Iowa 306, 218 N.W. 74 (1928); First State Sav. Bank of Muskegon Heights
v. Dake, 250 Mich. 525, 231 N.W. 135 (1930).

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§ 186. Representations as to one's own financial status—By purchaser

[Topic Summary](#) | [Correlation Table](#) | [References](#)

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West's Key Number Digest, [Fraud](#) , 27, 28

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 124](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to own financial standing—General form)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 125](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to own financial standing—Made through merchants' credit association)

If a buyer knowingly misrepresents the buyer's financial condition and thus induces the seller to sell the buyer goods on credit, the seller may rescind the sale and recover the goods sold.¹

If the transactions attacked as fraudulent consist of a number of independent sales extending over a considerable time, and not a single transaction, application of the general principles must be applied to each transaction to obtain a proper result as there may be fraud justifying a rescission in one and not in another.²

A misrepresentation by the purchaser in a land contract as to the purchaser's financial responsibility may be ground for rescission by the seller where the contract provides for payment of the purchase price in future installments.³

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Footnotes

- 1 [Browning v. De Ford](#), 178 U.S. 196, 20 S. Ct. 876, 44 L. Ed. 1033 (1900); [McGregor v. Battle](#), 128 Ga. 577, 58 S.E. 28 (1907); [John Silvey & Co. v. Tift](#), 123 Ga. 804, 51 S.E. 748 (1905).
- 2 [Pelham v. Chattahoochee Grocery Co.](#), 146 Ala. 216, 41 So. 12 (1906).
- 3 [Olson v. Pettibone](#), 168 Minn. 414, 210 N.W. 149, 48 A.L.R. 913 (1926).

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§ 187. Representations as to third person's financial status

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 46](#) (Complaint, petition, or declaration—For damages—Conspiracy by bank and automobile dealer to misrepresent automobile dealer's true financial condition to finance company)
[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 126 to 128](#) (Complaint, petition, or declaration—For damages—Misrepresentations as to solvency of third person—Inducing sale of goods to third person)

It is well settled that where the other requisite elements of actionable fraud are present, false and fraudulent representations made to one contemplating business transactions or negotiations with a third person, concerning the financial status, solvency, or credit of such third person, constitute misrepresentations which may form the basis for actionable fraud.¹ Recovery may

be had for misrepresentation as to a third party's financial condition where a person for the purpose of inducing another to lend money to said third party misrepresents the financial responsibility or solvency of such third person.² Further, when one undertakes to answer a financial inquiry regarding a third party and there is no fiduciary or contractual relationship between the party inquiring and the party being inquired of, the party being inquired of is under a duty to answer truthfully.³ Generally, where a bank has given an honest opinion as to the financial worth and standing of a third person and as to whether the third person is entitled to credit, based on information known to the bank, the mere fact that the bank was mistaken in its opinion will not make it liable for fraud and deceit.⁴

Benefit to the representor is entirely immaterial as far as the representor's responsibility is concerned.⁵ In order to constitute the basis of a charge of fraud in any case, however, the statements must be reasonably certain and definite⁶ although under certain circumstances they may be implied.⁷ They must be more than mere expressions of opinion⁸ or statements as to something to eventuate in the future,⁹ and according to the language of many of the authorities, they must be false and fraudulent in that they were made with intent to deceive or so recklessly as to constitute the equivalent of wrongful knowledge.¹⁰ Statements as to the credit and financial standing of third persons are often largely matters of opinion¹¹ and are so understood,¹² and when such is the case, they are not actionable¹³ provided that they are honestly given.¹⁴

False representations regarding the financial condition of a third person made after credit has been extended to the person are not actionable, at least where it is not shown that subsequently to the making of the false representations, the representee acted to the representee's detriment, refrained from asserting some right, or changed the representee's position by reason of such representations.¹⁵

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Footnotes

- 1 [Isaigi v. Brown](#), 58 U.S. 183, 17 How. 183, 15 L. Ed. 208, 1854 WL 7486 (1854); [Lehigh Valley Trust Co. v. Central Nat. Bank of Jacksonville](#), 409 F.2d 989 (5th Cir. 1969); [Forbes v. Auerbach](#), 56 So. 2d 895, 32 A.L.R.2d 176 (Fla. 1952); [Nailor v. Western Mortg. Co.](#), 54 Wash. 2d 151, 338 P.2d 737, 72 A.L.R.2d 938 (1959); [First Nat. Bank in Oshkosh v. Scieszinski](#), 25 Wis. 2d 569, 131 N.W.2d 308 (1964).
As to the liability of a mercantile credit reporting agency for negligence, or negligence amounting to fraud, see [Am. Jur. 2d, Collection and Credit Agencies](#) §§ 39, 40.
- 2 [Community Bank, Lake Oswego, Oregon v. Bank of Hallandale & Trust Co.](#), 482 F.2d 1124 (5th Cir. 1973).
- 3 [Metal Trading Services of Colorado, Inc. v. Trans-World Services, Inc.](#), 781 F. Supp. 1539 (D. Kan. 1991) (applying Kansas law).
- 4 [Circle 76 Fertilizer, Inc. v. Nelsen](#), 219 Neb. 661, 365 N.W.2d 460, 41 U.C.C. Rep. Serv. 1079 (1985).
- 5 § 33.
- 6 [Pain v. Kiel](#), 288 F. 527 (C.C.A. 8th Cir. 1923); [Lillian Knitting Mills Co. v. Earle](#), 237 N.C. 97, 74 S.E.2d 351 (1953).
A general statement or report stating conclusions as to the financial standing of a third person which is made the basis of credit to that person is not generally actionable. [Yates Center Nat. Bank v. Allen](#), 92 Kan. 481, 141 P. 553 (1914).
- 7 [Eastern Trust & Banking Co. v. Cunningham](#), 103 Me. 455, 70 A. 17 (1908).
- 8 [Lord v. Goddard](#), 54 U.S. 198, 13 How. 198, 14 L. Ed. 111, 1851 WL 6691 (1851); [Yates Center Nat. Bank v. Allen](#), 92 Kan. 481, 141 P. 553 (1914).
- 9 [Taylor v. Commercial Bank](#), 174 N.Y. 181, 66 N.E. 726 (1903).
- 10 § 127.
- 11 [Murray v. Lamb](#), 174 Or. 239, 148 P.2d 797 (1944).
- 12 [Russell v. Clark's Ex'rs](#), 11 U.S. 69, 3 L. Ed. 271, 1812 WL 1519 (1812).

- 13 Gleason v. Thaw, 234 F. 570 (C.C.A. 2d Cir. 1916); Yates Center Nat. Bank v. Allen, 92 Kan. 481, 141 P. 553 (1914); Simons v. Cissna, 52 Wash. 115, 100 P. 200 (1909).
- 14 § 127.
- 15 Todd v. Wichita Federal Sav. and Loan Ass'n, 184 Kan. 492, 337 P.2d 648 (1959).

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G. Representations and Statements as to Particular Matters

4. Credit, Solvency, and Financial Standing

§ 188. Representations as to third person's financial status—Necessity of indicating extent of credit

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

It has been held that a general representation as to the solvency or credit of a third person is not actionable where there is no indication in the representation itself or in the circumstances as to the extent to which the credit may safely go.¹ There is also authority, however, that a representation as to a third person's financial status is actionable even though there was no limitation in the representation on the amount of credit that should be given.²

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Footnotes

¹ [James v. Crosthwait](#), 97 Ga. 673, 25 S.E. 754 (1896).

² [Simons v. Cissna](#), 52 Wash. 115, 100 P. 200 (1909) (representation that a corporation was solvent).

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§ 189. Representations as to third person's financial status—Use of particular terms

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Just what may be said to have been fairly indicated by the use of such general terms as "good," "responsible," or "solvent," with reference to the financial condition or credit of another, has been variously interpreted by the courts.¹ A statement that a person is solvent is held to be a representation of fact,² and a representation that a third person is "good" for credit has been held to be factual and actionable.³

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Footnotes

¹ [Farmers' Sav. Bank of Morrison v. Jameson](#), 175 Iowa 676, 157 N.W. 460 (1916).

² [Simons v. Cissna](#), 52 Wash. 115, 100 P. 200 (1909).

³ [Redfern v. Cornell](#), 6 A.D. 436, 39 N.Y.S. 656 (1st Dep't 1896).

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4. Credit, Solvency, and Financial Standing

§ 190. Representations as to credit or financial condition of firm, corporation, or association

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 36](#) (Complaint, petition, or declaration—For damages—Intentional misrepresentation of true financial condition of corporation to which plaintiff had extended credit)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 139](#) (Complaint, petition, or declaration—For damages—Misrepresentation as to solvency of defendant's company—Plaintiff induced to discount notes on company's endorsement and guarantee)

The rule that a false representation regarding the credit, solvency, or financial condition of a third person is actionable¹ applies with particular force where a person makes false representations as to the financial status of the person's own firm.² The rule also

applies where the representations are made concerning another firm, especially where they are based on inadequate investigation and information.³ It has been stated, however, that a representation as to the credit condition of a company is an opinion and is not actionable.⁴

False representations as to the financial condition or solvency of a corporation may constitute the basis of an action in fraud against anyone making such representations.⁵ Misrepresentations of officers, directors, and stockholders of corporations as to the financial condition of such corporations are actionable by third persons who, in reliance on such representations, deal with or extend credit to the corporation and incur losses thereby.⁶ Similarly, representations by partners concerning the financial condition of the partnership may be actionable.⁷ A representation by members of an association that there are sufficient funds in the possession of the association to pay fully in cash all persons performing work in the erection of a building for the association is not promissory in character, but has a direct relation to an existing state of facts, and is therefore actionable where it is false.⁸

Where a corporate director or officer makes assurances of the payment of overdrafts and checks, while knowing the corporation is insolvent, there is no fraud as there has been no misrepresentation of the corporation's financial condition absent some disclosure regarding the financial condition of the corporation.⁹

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Footnotes

- 1 § 187.
- 2 *Tindle v. Birkett*, 171 N.Y. 520, 64 N.E. 210 (1902).
A blanket assertion of reliance on oral representations about a company are insufficient where the party making such allegation is unable to recall the content of these oral representations. *Vreeken v. Lockwood Engineering, B.V.*, 148 Idaho 89, 218 P.3d 1150 (2009).
The principal of a debtor corporation did not knowingly misstate or omit a material fact with the intention of inducing the creditor's reliance on the misstatement, which caused it to reasonably rely on that misrepresentation, where the creditor knew that the debtor was in financial distress when he requested additional credit, he made the request as part of a good faith effort to cure the debtor's default, and he never intended to fail to repay the debtor's creditors. *Dowlings, Inc. v. Homestead Dairies, Inc.*, 88 A.D.3d 1226, 932 N.Y.S.2d 192 (3d Dep't 2011).
- 3 *Duncan v. Stoneham*, 253 N.Y. 183, 170 N.E. 571 (1930).
- 4 *Evans v. Gray*, 215 So. 2d 40 (Fla. 3d DCA 1968).
- 5 *Kirby v. Davis*, 91 S.W.2d 215 (Mo. Ct. App. 1936); *Dash v. Jennings*, 272 A.D. 1073, 74 N.Y.S.2d 881 (2d Dep't 1947).
- 6 *Link v. Cox*, 529 S.W.2d 189 (Mo. Ct. App. 1975).
- 7 *Dolce v. Dolce*, 108 Ill. App. 3d 817, 64 Ill. Dec. 363, 439 N.E.2d 1028 (1st Dist. 1982).
- 8 *Samuel W. Hurowitz, Inc., v. Selkin*, 241 A.D. 269, 271 N.Y.S. 576 (1st Dep't 1934).
- 9 *Marine Midland Bank v. Meehan's Exp., Inc.*, 72 A.D.2d 624, 420 N.Y.S.2d 788 (3d Dep't 1979).

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4. Credit, Solvency, and Financial Standing

§ 191. Representations as to credit or financial condition of firm, corporation, or association—Respecting transactions in corporation's securities

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Forms

[Am. Jur. Pleading and Practice Forms, Corporations § 133](#) (Complaint, petition, or declaration—For damages—Misrepresentations in prospectus—Promoter's guaranty of minimum annual dividend on stock subscription)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit §§ 135 to 138](#) (Complaint in federal court—For damages—Purchase of stock induced by misrepresentation)

It is frequently held that representations as to the value and desirability of corporate securities, such as stocks and bonds, made to induce a commercial transaction therein, are actionable fraud where false, and where definite statements and particular facts as to the financial condition, assets, and status of the corporation have been asserted,¹ especially where the parties have not had equal knowledge or means of knowledge of the subject.² A mere expression of opinion, however, as to the worth of a corporation or the value of its securities, or, what they will be worth in the future, in the absence of any particular statements or special circumstances affecting the relationship of the parties, will not be regarded as actionable.³

Misrepresentations as to the financial condition of a corporation contained in reports of directors,⁴ or of a proposed corporation contained in a prospectus,⁵ may constitute fraud where one is induced to purchase stock in reliance thereon, the same as false

representations by officers of a bank that induce the making of deposits therein⁶ provided that they are statements of facts and not mere expressions of opinion.⁷

The rule that a misstatement of particular facts affecting the financial worth of a corporation and the attendant value of its securities is actionable has been applied many times to various false representations, and thus, false representations that a corporation has a certain capital or a particular financial standing,⁸ or that a mining company has in its treasury a large sum of money available for the development of a mine or has ore of a certain value in sight,⁹ made by one seeking to dispose of stock, will sustain an action of deceit where the other elements of actionable fraud are present. False representations that a corporation has been properly incorporated, and as to the condition of its business and the value of its stock, have been held to be ground for rescission of a transaction involving such stock.¹⁰ It has also been suggested that fraud might be predicated upon deliberately false statements as to the future listing of stock on an exchange, or the future commencement of operations by a corporation the stock of which was sold.¹¹

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Footnotes

- 1 Blasdel v. Mullenix, 356 F. Supp. 924 (W.D. Okla. 1971); Laney-Payne Farm Loan Co. v. Greenhaw, 177 Ark. 589, 9 S.W.2d 19, 73 A.L.R. 1117 (1928); Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785, 73 A.L.R. 1111 (1929).
- 2 Kirby v. Davis, 91 S.W.2d 215 (Mo. Ct. App. 1936); Trust Co. of Norfolk v. Fletcher, 152 Va. 868, 148 S.E. 785, 73 A.L.R. 1111 (1929).
- 3 Deming v. Darling, 148 Mass. 504, 20 N.E. 107 (1889).
- 4 Am. Jur. 2d, Corporations §§ 1636, 1637.
- 5 Am. Jur. 2d, Corporations §§ 522, 523.
- 6 Am. Jur. 2d, Banks and Financial Institutions § 406.
- 7 Bushey v. Coffman, 103 Kan. 209, 173 P. 341 (1918); Redfield v. Lamb, 103 Neb. 410, 172 N.W. 48 (1919).
- 8 Kirby v. Davis, 91 S.W.2d 215 (Mo. Ct. App. 1936).
- 9 Barndt v. Frederick, 78 Wis. 1, 47 N.W. 6 (1890).
- 10 Wagner v. Fehr, 211 Pa. 435, 60 A. 1043 (1905).
- 11 Edward Brockhaus & Co. v. Gilson, 263 Ky. 509, 92 S.W.2d 830 (1936).

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§ 192. Representations as to checks and notes

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[Misrepresentations as to financial condition or credit of third person as actionable by one extending credit in reliance thereon, 32 A.L.R.2d 184](#)

Forms

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 44](#) (Complaint, petition, or declaration—For damages—Fraud in obtaining draft from bank—Purchaser gave bank worthless check)

[Am. Jur. Pleading and Practice Forms, Fraud and Deceit § 201](#) (Answer—Defense—Fraud in obtaining note—Representation that plaintiff was authorized by defendant's creditor to take defendant's note in satisfaction of debt)

The drawing of a check where there are insufficient funds in the bank to pay it is a false representation that the drawer has funds sufficient to meet the check in the hands of the drawee.¹ Knowledge as to the sufficiency of funds on deposit to pay a check will ordinarily be inferred or presumed from the fact of drawing and delivering the check.²

A person who is induced to discount a note and extend credit for the proceeds to the maker-payee in reliance upon false and fraudulent representations as to the maker-payee's financial condition may upon discovery of the fraud rescind the credit so extended, and the amount advanced becomes immediately due and payable and is recoverable or available as an offset.³

False representations that a note⁴ or check⁵ is good, or false representations as to the solvency of the makers⁶ of the notes sold, or that the notes sold⁷ are perfectly good,⁸ or "as good as gold,"⁹ have been held to constitute actionable fraud. Generally, such a statement is regarded as a statement of fact rather than a mere expression of opinion¹⁰ although the form of the statement and the circumstances in which the representation was made may indicate that it was mere opinion and consequently not actionable.¹¹ Some courts thus hold that representations of this type may be either statements of fact or expressions of opinion.¹²

A purchaser of checks, in scanning signatures of sellers' representatives into a computer and electronically "pasting" these signatures on assignment forms which contain numerous warranties to which the sellers have never agreed, and in then affixing these "manufactured" assignments to a complaint which the purchaser serves on the drawer of the checks, in order to make it appear that the purchaser is a holder in due course not subject to various defenses that the drawer might otherwise assert, makes a material misrepresentation of presently existing or past fact, of the kind required to support a common law fraud claim.¹³

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Footnotes

- 1 [Hi-Pro Fish Products, Inc. v. McClure](#), 346 F.2d 497 (8th Cir. 1965); [In re Damiani](#), 157 B.R. 17 (Bankr. N.D. Ohio 1993) (applying Ohio law); [A. Sam & Sons Produce Co. v. Campese](#), 14 A.D.2d 487, 217 N.Y.S.2d 275 (4th Dep't 1961).
- 2 [§ 465](#).
- 3 [Wolf v. National City Bank of New York](#), 170 A.D. 565, 156 N.Y.S. 575 (1st Dep't 1915).
- 4 [Doolen v. Hulsey](#), 192 S.W. 364 (Tex. Civ. App. Amarillo 1917).
- 5 [Sparks v. Guaranty State Bank](#), 179 Kan. 236, 293 P.2d 1017 (1956).
- 6 [Binghamton Trust Co. v. Auten](#), 68 Ark. 299, 57 S.W. 1105 (1900).
A buyer's tender of "insufficient funds" checks constituted a written misrepresentation of the solvency of the buyer. [Amoco Pipeline Co. v. Admiral Crude Oil Corp.](#), 490 F.2d 114, 13 U.C.C. Rep. Serv. 1019 (10th Cir. 1974).
- 7 [Standard Motors Finance Co. v. Mitchell Auto Co.](#), 173 Ark. 875, 293 S.W. 1026, 57 A.L.R. 877 (1927).
- 8 [Crane v. Elder](#), 48 Kan. 259, 29 P. 151 (1892); [Doolen v. Hulsey](#), 192 S.W. 364 (Tex. Civ. App. Amarillo 1917).
A representation that certain notes signed by various persons are "good bankable paper" is a representation of fact. [Engen v. Merchants' & Mfrs.' State Bank](#), 164 Minn. 293, 204 N.W. 963, 43 A.L.R. 610 (1925).
- 9 [Doolen v. Hulsey](#), 192 S.W. 364 (Tex. Civ. App. Amarillo 1917).
- 10 [Crane v. Elder](#), 48 Kan. 259, 29 P. 151 (1892).
- 11 [Andrews v. Jackson](#), 168 Mass. 266, 47 N.E. 412 (1897).
- 12 [Andrews v. Jackson](#), 168 Mass. 266, 47 N.E. 412 (1897).
- 13 [Triffin v. Automatic Data Processing, Inc.](#), 394 N.J. Super. 237, 926 A.2d 362 (App. Div. 2007).

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§ 193. Representations as to obtaining loan, or loan commitment, on property

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[Misrepresentation as to loan commitment on real estate as ground of action, counterclaim, or rescission by vendee, 14 A.L.R.2d 1347](#)

Although, generally, a statement that a loan can be obtained on property amounts to a mere expression of opinion that is not actionable as a fraudulent representation,¹ such a statement may be actionable where it is expressed as a fact.² A distinction has been made between cases in which the vendor of real property falsely represented that a loan commitment of a specified sum had been made on the property, and cases in which the vendor falsely represented that a loan of a specified sum could be obtained thereon, and in the former cases, the false representation is considered material and actionable³ whereas in the latter cases, the false representation is considered promissory in nature and not actionable in the absence of special circumstances.⁴

A bank may be held liable in fraud on account of a failure to make a loan in accordance with an employee's representations where the representation is not one that the loan will be made but that the loan has already been secured.⁵ However, the lender may not be liable where it merely stated that it would consider an application for a new loan.⁶

Footnotes

- 1 Weinstein v. Arlington Oaks, Inc., 286 A.D. 1102, 145 N.Y.S.2d 691 (2d Dep't 1955).
- 2 Shaffer v. Rhyne, 75 S.W.2d 133 (Tex. Civ. App. Waco 1934).
- 3 Gable v. Niles Holding Co., 209 Minn. 445, 296 N.W. 525 (1941); Weinstein v. Arlington Oaks, Inc., 286 A.D. 1102, 145 N.Y.S.2d 691 (2d Dep't 1955).
- 4 Edwards v. French, 304 Mo. 194, 263 S.W. 132 (1924); Hazlett v. Wilkin, 42 Okla. 20, 140 P. 410 (1914).
- 5 Colonial Nat. Bank v. Bredenkamp, 151 Ind. App. 366, 279 N.E.2d 845 (1972).
- 6 Guaranty Bank of Mamou v. Fontenot, 551 So. 2d 804 (La. Ct. App. 3d Cir. 1989).

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